84-1041

Office-Supreme Court, U.S.
FILED
DEC 11 1984
ALEXANDER L. STEVAS,
CLERK

No. _____

_____

In The
Supreme Court of the United States
October Term, 1984

AIR JAMAICA LIMITED, a foreign corporation;
AEROVIAS COLOMBIANAS LIMITADA, a foreign corporation;
CARIBBEAN AIR CARGO CO., LTD; a foreign corporation;
GUYANA AIRWAYS CORPORATION, a foreign corporation;
LINEAS AEREAS del CARIBE, S.A., a foreign corporation;
TACA INTERNATIONAL AIRLINES, S.A., a foreign corporation;
COMPANIA PERUANA de AVIACION "FAUCETT", S.A.,
a foreign corporation;
AERONAVES del PERU, S.A., a foreign corporation,
and
TRANSPORTES AEREOS MERCANTILES
PANAMERICANOS, S.A., a foreign corporation,

Appellants,

-vs-

STATE OF FLORIDA, DEPARTMENT OF REVENUE,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

Jurisdictional Statement

JERRY M. DALE
8370 West Flagler
Miami, Florida 33144
and
MORTON H. SILVER
P.O. Box 522965
Miami, Florida 33152
of Counsel

J.C. O'STEEN
THOMAS W. LAGER
LAGER, WOODWARD & O'STEEN

320 West Park Avenue
Tallahassee, Florida 32301
(904) 222-4848
Counsel for Appellant

Questions Presented

I. Whether the State of Florida Sales Tax on aviation fuel is a direct and substantial violation of United States treaties with foreign governments.

A. Whether the State of Florida Sales Tax on aviation fuel is a direct violation of the specific air transport service treaties and federal law.

B. Whether the State of Florida Sales Tax on aviation fuel is state action impinging upon the area of foreign air carrier commerce which has been preempted by federal executive and legislative action.

II. Whether the State of Florida Sales Tax on aviation fuel violates the commerce clause of the United States Constitution by creating the risk of uncontrollable multiple taxation between nations, the risk of state interference with uniform national foreign policy, and the risk of interference with interstate commerce.

III. Whether the State of Florida Sales Tax on aviation fuel violates the Equal Protection Clause and the Due Process Clause of the United States Constitution by impermissively classifying airlines differently than other modes of common carriers and pegging the price of each gallon of fuel at $1.148 a gallon prior to imposing a 5% tax rate on the sale of the fuel.

INDEX

QUESTIONS PRESENTED 3
OPINION BELOW 4
JURISDICTION 4
CONSTITUTIONAL, STATUTORY & "TREATY" PROVISIONS 4
STATEMENT OF THE CASE 6
THE QUESTIONS ARE SUBSTANTIAL 9
CONCLUSION 24
APPENDIX 26

CITATIONS

Cases:

Aerovias Interamericanas de Panama, S.A. v. Board of County Commissioners of Dade County, Florida, 197 F. Supp. 230 (S.D. Fla. 1961), rev'd on other grounds, 307 F.2d 802 (5th Cir. 1962). 10

Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 79 S.Ct. 437, 3 L.Ed.2d 480 (1959) 22

B. Altman and Company v. United States, 224 U.S. 583, 32 S.Ct. 593, 56 L.Ed. 894 (1912) 10

Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977), reh. den. 430 U.S. 976 ..... 17, 18

De Canas v. Bica, 424 U.S. 351, 96 S.Ct. 933, 47 L.Ed.2d 43 (1976) 16

Delta Air Lines, Inc. v. Department of Revenue, 455 So. 2d 317 (Fla. 1984) 6

Department of Revenue v. Air Jamaica, Ltd., 455 So. 2d 324 (Fla. 1984) 4, 9

Department of Revenue v. Wardair Canada, Ltd., 455 So. 2d 326 (Fla. 1984) 9

Eastern Air Transport, Inc. v. South Carolina Tax Commission, 285 U.S. 147, 52 S.Ct. 340, 76 L.Ed. 673 (1932) 23

Frazer v. Manson, 703 F.2d 30 (2d Cir. 1983), cert. den. 104 S.Ct. 339 22

Fulton Market Cold Storage Co. v. Cullerton, 582 F.2d 1071 (7th Cir. 1978), cert. den. 439 U.S. 1121 22

Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 99 S.Ct. 1813, 60 L.Ed.2d 336 (1979) 4, 19, 20, 21

Lineas Aereas Costarricenses, S.A. v. State of Florida, Department of Revenue, No. 83-964 (2d Judicial Circuit Florida, June 1, 1983) 16, 19

Louisville & Nashville Railroad Co. v. Public Service Commission of Tennesse, 389 F.2d 247 (6th Cir. 1968) 23

Norfolk & Western Railway Co. v. Missouri State Tax Commission, 390 U.S. 317, 88 S.Ct. 995, 19 L.Ed.2d 1201 (1968), reh. den. 390 U.S. 1046 22

Sanitary Dist. of Chicago v. United States, 266 U.S. 405, 45 S.Ct. 176, 69 L.Ed. 352 (1925) 16

United States v. Belmont, 301 U.S. 324, 57 S.Ct. 758, 81 L.Ed. 1134 (1937) 11, 12

Constitution:

U.S. Const. art. I 4
U.S. Const. art. I, §8, cl. 3 ..... 8, 17, 19
U.S. Const. art. II, §2, cl. 2 ..... 8, 19
U.S. Const. amend. XIV 8
U.S. Const. art. VI, cl. 2 ..... 8, 15

Statutes:

28 U.S.C. §1257(2) (1982) 4
49 U.S.C. §1372 (1982) 11, 16
49 U.S.C. §1508(b) (1982) 7, 11
Fla. Stat. §206.45 (1983) 18
Fla. Stat. §212.08(4) (1981) 6
Fla. Stat. §212.08(4) (1983) 6
Fla. Stat. §212.08(4)(a) (1983) 22, 23
Fla. Stat. §212.69(3) (1983) 18
Fla. Stat. §339.08 (1983) 7, 18
Fla. Stat. §339.081 (1983) 18
1983 Fla. Laws 3 6

Treaties and other Agreements:

Air Transport Agreement (Peru), T.I.A.S. No. 1587 5

Air Transport Agreement Between the Government of Barbados and the Government of the United States of America, T.I.A.S. No. 10370 ..... 5, 13

Air Transport Agreement Between the Government of the United States of America and the Government of El Salvador, T.I.A.S. 10488 ..... 5, 13

Air Transport Services Agreement Between the United States of America and Jamaica, T.I.A.S. No. 6770 ..... 5, 12

Air Transport Agreement Between the Government of the United States of America and the Government of the Republic of Colombia, T.I.A.S. No. 5338 5

Agreement Between the Government of the United States of America and the Government of the United Kingdom Relating to Air Services Between their Respective Territories, T.I.A.S. No. 1507 . . . . . 5, 14

Air Transport Services Protocol Agreement Between the United States of America and Jamaica, T.I.A.S. No. 9613 . . . . . 5, 13

Convention on International Civil Aviation (Chicago Convention), T.I.A.S. No. 1591 . . . . . 7, 16

Other:

RESTATEMENT (SECOND) OF FOREIGN RELATIONS §131(1) (Tent. Draft No. 1, 1980) 10

No. _____

_____

In The
Supreme Court of the United States
October Term, 1984

AIR JAMAICA LIMITED, a foreign corporation;
AEROVIAS COLOMBIANAS LIMITADA, a foreign corporation;
CARIBBEAN AIR CARGO CO., LTD; a foreign corporation;
GUYANA AIRWAYS CORPORATION, a foreign corporation;
LINEAS AEREAS del CARIBE, S.A., a foreign corporation;
TACA INTERNATIONAL AIRLINES, S.A., a foreign corporation;
COMPANIA PERUANA de AVIACION "FAUCETT", S.A.,
a foreign corporation;
AERONAVES del PERU, S.A., a foreign corporation,
and
TRANSPORTES AEREOS MERCANTILES
PANAMERICANOS, S.A., a foreign corporation,

Appellants,

-vs-

STATE OF FLORIDA, DEPARTMENT OF REVENUE,

Appellee.

JURISDICTIONAL STATEMENT OF APPELLANT

AIR JAMAICA LIMITED; AEROVIAS COLOMBIANAS LIMITADA; CARIBBEAN AIR CARGO CO., LTD.; GUYANA AIRWAYS CORPORATION; LINEAS

AEREAS del CARIBE, S.A.; TACA INTERNATIONAL AIRLINES, S.A.; COMPANIA PERUANA de AVIACION "FAUCETT", S.A.; AERONAVES del PERU, S.A.; and TRANSPORTES AEREOS MERCANTILES PANAMERICANOS, S.A., hereinafter referred to collectively as the "Appellants". The Appellee, State of Florida, Department of Revenue, will be referred to herein as the "DOR". Because this case involves treaties between the United States and the home nations of the various airlines, where it is necessary to refer to a specific air carrier of a specific nation, such foreign air carrier or nation will be referred to by name. Generally, when referring to a specific air carrier such air carrier will be referred to by its abbreviated name as set forth in the caption.

Questions Presented

I. Whether the State of Florida Sales Tax on aviation fuel is a direct and substantial violation of United States treaties with foreign governments.

A. Whether the State of Florida Sales Tax on aviation fuel is a direct violation of the specific air transport service treaties and federal law.

B. Whether the State of Florida Sales Tax on aviation fuel is state action impinging upon the area of foreign air carrier commerce which has been preempted by federal executive and legislative action.

II. Whether the State of Florida Sales Tax on aviation fuel violates the commerce clause of the United States Constitution by creating the risk of uncontrollable multiple taxation between nations, the risk of state interference with uniform national foreign policy, and the risk of interference with interstate commerce.

III. Whether the State of Florida Sales Tax on aviation fuel violates the Equal Protection Clause and the Due Process Clause of the United States Constitution by impermissively classifying airlines differently than other modes of common carriers and pegging the price of each gallon of fuel at $1.148 a gallon prior to imposing a 5% tax rate on the sale of the fuel.

Opinion Below

The opinion of the Supreme Court of Florida, which appears in the appendix hereto, p. 28, *infra,* is reported at 455 So. 2d 324 (Fla. 1984).

The opinion of the trial court, the Circuit Court for the Second Judicial Circuit, is unreported. It has been reprinted in the appendix hereto, p. 31, *infra.*

Jurisdiction

The judgment of the Supreme Court of Florida upholding the validity of Chapter 83-3, Laws of Florida, was entered on June 14, 1984. See p. 28, *infra.* A motion for rehearing was filed on June 26, 1984. See p. 90, *infra.* The motion for rehearing was denied on September 12, 1984. See p. 95, *infra.*

A Notice of Appeal to this Court was duly filed in the Supreme Court of Florida on September 28, 1984. See p. 98, *infra.*

This appeal is being docketed in this Court within 90 days from the denial of rehearing below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2) (1982). Jurisdiction was granted pursuant to the above statute in, *Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434, 99 S.Ct. 1813, 60 L.Ed.2d 336 (1979), which involves similar constitutional and treaty issues.

Constitutional, Statutory and "Treaty" Provisions

Article I, United States Constitution:

The Congress shall have the power . . . to regulate commerce with foreign nations, and among the several states . . . .

Amendment XIV, United States Constitution:

No State shall . . . deprive any person of . . . property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Chapter 83-3, Laws of Florida:

Since Chapter 83-3 is lengthy, it is set forth in the Appendix hereto. See p. 37, *infra.*

Air Transport Services Agreement Between the United States of America and Jamaica, October 2, 1969, 20 U.S.T. 2962, T.I.A.S. No. 6770, 726 U.N.T.S. 183. See p. 100, *infra.*

Air Transport Services Protocol Between the United States of America and Jamaica, April 4, 1979, 31 U.S.T. 308, T.I.A.S. No. 9613, amending T.I.A.S. No. 6770. See p. 102, *infra.*

Air Transport Agreement Between the Government of the United States of America and the Government of the Republic of Colombia, October 24, 1956, 14 U.S.T. 429, T.I.A.S. No. 5338, 476 U.N.T.S. 77. See p. 105, *infra.*

Agreement Between the Government of the United States of America and the Government of the United Kingdom Relating to Air Services Between their Respective Territories, February 11, 1946, 60 Stat. 1499, 12 Bevans 726, T.I.A.S. No. 1507, 3 U.N.T.S. 253. See p. 107, *infra.*

Air Transport Agreement Between the Government of Barbados and the Government of the United States of America, April 8, 1982, T.I.A.S. No. 10370. See p. 110, *infra.*

Air Transport Agreement Between the Government of the United States of America and the Government of El Salvador, April 2, 1982, T.I.A.S. No. 10488. See p. 114, *infra.*

Air Transport Agreement (Peru), December 27, 1946, T.I.A.S. No. 1587. See p. 112, *infra.*

Statement of the Case

This action was brought by Air Jamaica Limited (Air Jamaica), the national airline of Jamaica, to enjoin the State of Florida, Department of Revenue, from collecting a sales tax on aviation fuel purchased by Air Jamaica for use in foreign commerce.

On March 3, 1983, the Florida Legislature enacted Senate Bill 8A, 1983 Fla. Laws 3, Chapter 83-3, Laws of Florida, entitled "An Act Relating to Transportation, Finance and Administration" (hereinafter Senate Bill 8A) which was signed into law by the Governor of the State of Florida effective April 1, 1983.

Senate Bill 8A, as enforced by DOR, substantially revised the taxing provisions contained in Chapters 206, 212 and 220, Florida Statutes.

Prior to Senate Bill 8A, the Florida sales tax laws explicitly provided that with respect to fuel purchased in Florida for use in interstate or foreign commerce, common carriers licensed by the Interstate Commerce Commission or the Civil Aeronautics Board were taxed on the basis of the ratio of the carrier's intrastate (Florida) mileage to the carrier's interstate or foreign mileage traveled. FLA. STAT. §212.08(4) (1981). Thus, by use of a proration formula, Florida only taxed that portion of commerce activity that occurred within the state.

First, Section 5 of Senate Bill 8A eliminated the proration provision of sales taxes on fuel sold for use by aircraft. FLA. STAT. §212.08(4) (1983). However, other common carriers, such as vessels, trains and trucks, operating in interstate or foreign commerce, continue to enjoy the proration provision of §212.08(4), Fla. Stat., thereby upsetting the constitutional balance.

Second, Senate Bill 8A arbitrarily pegs the price of aviation fuel at $1.148 per gallon based on the price of gasoline. A five percent sales tax will be applied to this arbitrary price until June 1, 1985. Thereafter, the price will be determined by DOR. Under the prior law, the tax was assessed based on the fair market price of aviation fuel.

Third, Senate Bill 8A afforded Florida-based airlines with 1200 or more employees a partial corporate state income tax credit. The Florida Supreme Court held the corporate income tax credit to be unconstitutional. *Delta Air Lines, Inc. v. Department of Revenue,* 455 So. 2d 317, 321 (Fla. 1984).

Revenues generated by the imposition of the new sales tax, as set forth in Chapter 212, Fla. Stat., are to be utilized by the State of Florida, Department of Transportation, for the purposes set forth in Fla. Stat. §339.08 (1983). Under this Statute, these tax revenues are to be used in areas wholly unrelated to air transportation, such as the construction and maintenance of roadways within the state. The foreign air carriers receive no benefit from the payment of the fuel tax as imposed by Senate Bill 8A.

After the action was filed by Air Jamaica, on April 12, 1983, Air Jamaica amended its brief and joined 11 other foreign carriers.[1] The Appellants sought declaratory relief and a permanent injunction on the basis that Senate Bill 8A was inconsistent with, and contrary to the language of the International Agreements between the United States and the respective countries of the Appellants and the Constitutions of the United States and the State of Florida.

Pursuant to the International Agreements, the foreign countries concerned have designated the Appellants to provide air transportation service between Miami and their respective international destinations. All of the Appellants purchase fuel in Miami for use in flying to one or more of these foreign countries and only a very small percentage of fuel is consumed within the boundaries of Florida and the United States.

By federal law, the Appellants are limited to providing international air service to and from the United States. They are forbidden from engaging in interstate or intrastate transportation. 49 U.S.C. §1508(b) (1982). The fuel purchased in Miami by the Appellants is used solely in foreign commerce.

The genesis of the United States effort to standardize the regulation of foreign air commerce with other nations was a multilateral treaty concerning the convention of International Civil Aviation (hereinafter Chicago Convention) T.I.A.S. 1591. The

---

[1] Three of the original plaintiffs have decided against participating in this Appeal. They are: Aeromar C. por A., a foreign corporation of the Dominican Republic; Hispaniola Airways C. por A., a foreign corporation of the Dominican Republic; and Aeroservicios Ecuatorianos C. A., a foreign corporation of Ecuador.

Chicago Convention gave birth to numerous bilateral air transport agreements. The purpose and effect of the treaties were to foster economic growth and friendship among the various nations. Substantially all of these treaties speak to the issue of duties and charges on fuel. Substantially all of the Appellants are parties to the treaties at issue and all of the Appellants have rights established by the treaties and federal law.

Florida's Senate Bill 8A conflicts with the intent and stated purpose of the international agreements. By virtue of federal legislation and treaties, the United States Federal Government and the respective state sovereigns of the appellants cannot assess a fuel tax, however, the State of Florida attempts to do so.

After the initial complaint was filed by Air Jamaica, by order to the trial court the complaint was amended to include eleven other foreign airlines. The parties stipulated to a briefing schedule and an early trial date was obtained. A procedure was instituted which allowed the airlines to self-accrue the tax imposed by Senate Bill 8A during the pendency of the proceedings subject to certain conditions. Appellants continue to self-accrue the tax through this appeal.

It was at the trial court where the Appellants first raised the United States Constitutional and Treaty issues. In their Second Amended Complaint the following issues germane to this action were raised:

1. Article VI, Clause 2 of the United States Constitution, the Supremacy Clause;
2. Article I, Section 8 of the United States Constitution, the Commerce Clause;
3. Article II, Section 2, Clause 2 of the United States Constitution;
4. 14th Amendment of the United States Constitution, Equal Protection and Due Process Clauses;
5. Treaties and Protocols heretofore mentioned.

The Circuit Court entered an Order of final judgment on July 19, 1983, upholding the constitutionality of Senate Bill 8A. However, it did rule in favor of the Appellants' assertion that they should be exempt from the tax by virtue of the treaties and protocols existing between the certain foreign countries and the United States. See p 31, *infra*. The DOR appealed the Circuit Cout's holding and Appellants cross-appealed.

On June 14, 1984 the Supreme Court of Florida in a 4-2 decision affirmed the order of the Circuit Court as to the constitutionality of Senate Bill 8A except that portion of the statute pertaining to a tax credit for air carriers with home offices located in Florida and with more than 1200 employees. The court also reversed the circuit court to the extent that the circuit court recognized an exemption from the tax for foreign airlines. *Department of Revenue v. Air Jamaica, Ltd.*, 455 So. 2d 324 (Fla. 1984). See p. 28, *infra.* The same constitutional and treaty issues that were argued at the trial level were also presented and argued before the Supreme Court of Florida.

The Questions are Substantial

I -A FLORIDA SALES TAX ON AVIATION FUEL IS A VIOLATION OF U.S.-FOREIGN TREATIES AND FEDERAL LAW

The question as to the international implications of a state imposing tax burdens on foreign air carriers in violation of valid bilateral agreements among nations has a substantial impact on the executive branch of the United States to conduct foreign affairs and does harm to the United States Constitution.

This substantial impact was recognized in Justice Overton's dissenting opinion in a companion case, *Department of Revenue v. Wardair Canada, Ltd.*, 455 So. 2d 326 (Fla. 1984), wherein he stated:

> I dissent. I find that the State of Florida has no authority to ignore valid air service agreements between the United States government and the governments of other countries which exempt airlines based in participating nations from duties and charges on fuels. In my view, the individual states of this country are precluded by those agreements from taxing fuel used by foreign airlines. To accept the majority's view means that all United States airlines could, in turn, be subject to local government taxation on fuel in foreign countries. We are one country and our constitution requires us to speak with one voice when the federal government enters into agreements and treaties with foreign governments. *See* U.S. Const. art. I, §8; art. VI. This state is precluded from enforcing this tax against this airline.

Id. at 330.

It is without question, states within these United States have the right to tax property, goods, services, etc., however, the right of states to impose a tax burden is not an unlimited right. This Court has rendered numerous opinions concerning a state's right to tax interstate commerce. More novel and far reaching is the issue as to whether a state may construct a tax through its legislative authority that offends the dignity of an international agreement.

Although the international agreements upon which Appellants rely may not be in the technical sense "treaties" requiring advice and consent of the Senate, they are international compacts, negotiated between the representatives of sovereign nations, and made in the name and on behalf of the contracting countries, and dealing with important commercial relations between the countries. If not technically a treaty requiring ratification, nevertheless, they are compacts authorized by Congress of the United States, negotiated and proclaimed under the authority of the President. *B. Altman and Company v. United States*, 224 U.S. 583, 32 S.Ct. 593, 56 L.Ed. 894 (1912).

The America Law Institute opines that "[i]nternational law and international agreements of the United States are law of the United States and supreme over the law of the several states." RESTATEMENT (SECOND) OF FOREIGN RELATIONS §131(1) (Tent. Draft No. 1, 1980).

This restatement of international law parallels the construction given by Judge Lieb in *Aerovias Interamericanas de Panama, S.A., v. Board of County Commissioners of Dade County, Florida,* 197 F. Supp. 230 (S.D. Fla. 1961), rev'd on other grounds, 307 F.2d 802 (5th Cir. 1962). Judge Lieb, in construing a Panamanian-U.S. Air Transport Service Agreement, stated:

> While it [Panamian—U.S. Agreement] was not individually ratified by the Senate as a treaty, it is classified as such by the State Department, and it is considered to be a compact having equal dignity with formal treaties in every respect. (footnote omitted—brackets added)

Id. at 240.

Each Appellant in this case enjoys certain privileges and immunities pursuant to an air transport service agreement of its government with the United States similar to the Panamanian-U.S. Agreement. During its pendency of this litigation each of these agreements were still in full force and effect.[2]

Whether the State of Florida may impose a sales tax on the aviation fuel purchased for consumption in international aviation by the respective Appellants is dependent upon the dignity and construction of these agreements. Each Appellant in this case is a foreign air carrier organized and existing under the laws of its foreign sovereign and pursuant to the international agreements is a designated carrier of the contracting parties.

Pursuant to the Federal Aviation Act of 1958, as amended, and their CAB permits (49 U.S.C. §1372 (1982)), each foreign air carrier is permitted to transport passengers, baggage, and cargo between their foreign country and the United States. Within the United States, they are forbidden to travel in intrastate or interstate commerce. (49 U.S.C. §1508(b) (1982)). Florida's Senate Bill 8A directly infringes upon foreign commerce.

The foreign countries which conduct business in the United States do not have a complex form of government made up of 50 state constitutions and laws; and one national constitution and laws. Appellants' foreign governments negotiate and enter into agreements with one national entity—the United States Federal Government.

This Court in its opinion in *United States v. Belmont,* 301 U.S. 324, 57 S.Ct. 758, 81 L.Ed. 1134 (1937), aptly described the balance of federal versus state responsibilities described wherein it stated:

> Governmental power over internal affairs is distributed between the national government and the several states. Governmental power over external affairs is not distributed, but is vested exclusively in the national government. And in respect of what was done here, the

---

[2] Treaties in force, Department of State Publication 9351.

> executive had authority to speak as the sole organ of that government. The assignment and the agreements in connection therewith did not, as in the case of treaties, as that term is used in the treaty making clause of the Constitution (Article 2, Section 2), require the advice and consent of Senate.

Id. at 330.

> We held [in *Altman*, 224 U.S. 583] that although this might not be a treaty requiring ratification by the Senate, it was a compact negotiated and proclaimed under the authority of the President, and as such was a treaty within the meaning of the Circuit Court of Appeals Act (26 Stat. 826), the construction of which might be reviewed upon direct appeal to this court.

Id. at 331. The Court continued:

> In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes the state of New York does not exist. Within the field of its powers, whatever the United States rightfully undertakes, it necessarily has warrant to consummate. And when judicial authority is invoked in aid of such consummation, State Constitutions, state laws, and state policies are irrelevant to the inquiry and decision. It is inconceivable that any of them can be interposed as an obstacle to the effective operation of a federal constitutional power. (citations omitted)

Id. at 331-2

Once the supremacy of an international agreement has been established over the state law, the second and final issue to be resolved by this Court is whether the Florida fuel tax on aviation fuel is a fuel tax encompassed in the international agreements.

All the international agreements relied on by Appellants utilize language similar to that found in the Jamaican-United States Air Transport Service Agreement (T.I.A.S. 6770) which states in Article 8 as follows:

> A. Each contracting party shall exempt the designated airline or airlines of the other contracting party to the fullest extent possible under its national law, on the basis of reciprocity, from import restrictions, customs, duties, excise taxes, inspections fees, and other national duties and charges on fuel, lubricants, consumable technical supplies, spare parts including engines, regular equipment, ground equipment, stores, and other items intended for use solely in connection with the operation of servicing of aircraft of the airlines of such other contracting parties engaged in international air service. The exemptions provided under this paragraph shall apply to items:
>
> * * * * *
>
> (3) Taken on board aircraft of the designated airlines of one contracting party in the territory the other and intended for use in international services; whether or not such items are used or consumed wholly within the territory of the contracting party granting the exemption.

Further, the Jamaican—United States Protocol, Article 10 (T.I.A.S. No. 9613); Salavador-U.S. Agreement Article 9(5) (T.I.A.S. No. 10488); and Barbados-United States Agreement, Article 9(5) (T.I.A.S. No. 10370) contain similar language as follows:

> (6) Each party shall use its best efforts to secure for the designated airlines of the other Party, on the basis of reciprocity, an exemption from taxes, duties, charges and fees imposed by State, regional and local authorities specified in paragraph (A) of Article 8 of the Agreement of this article, as well as from fuel through put charges, in the circumstances described in Article 8 of the Agreement, except to the extent that the charges are based on the actual cost of providing the service.

Jamaican-U.S. Protocol, Article 10, T.I.A.S. 9613.

The reference in the above paragraph referring to paragraph "A" relates back to "each contracting party shall exempt . . . airlines of the other contracting party . . . under its national law . . . from excise taxes on fuel." Jamaican-U.S. Agreement, Article 8, T.I.A.S. 6770.

There are some international agreements that are before this Court that do not contain the specific language referenced above (Jamaican-U.S. Protocol). However, the agreements that do not contain this specific language have similar and saving language. A representative example is the Air Transport Service Agreement between the United Kingdom and the United States (Guyana Airways) which says:

> Fuel, lubricating oils and spare parts introduced into, or taken on board aircraft in, the territory of one contracting party by, or on behalf of, a designated air carrier of the other contracting party and intended solely for use by the aricraft of such carrier shall be accorded, with respects to customs, duties, inspection fees or other charges imposed by the former contracting party, treatment *not less favorable than that granted to national air carriers engaged in international air services or such carriers of the most favored nation.* (emphasis added)

U.K.-U.S. Agreement Article 3(2), T.I.A.S. No. 1507.

This above stated "most favored nation clause" gives equal dignity to the remaining Appellants concerning the exemption of fuel to those carriers which have specific statements of exemption from state taxes. The logical conclusion is that these foreign nations would be granted treatment no less favorable than the most favored nation when dealing with the subject of aviation fuel taxation.

The United States government continues, as it has historically, to face the test of credibility among nations. Appellants ask this Court to take judicial notice of the sensitive international relations in Central and South America and the Caribbean from Granada to El Salvador. All of the Appellants are domiciled in this politically sensitive region. They seek an answer from this Court as to whether states can do what our national government has agreed by binding contract not to do. The implications of this substantial question are far reaching.

Since the decision of the Supreme Court of Florida is inconsistent with the United States Constitution and the several international agreements cited, *supra*, Appellants respectfully request that the Supreme Court of the United States take jurisdiction of the case. The question presented is so substantial as to require plenary consideration with briefs on the merits and oral argument for further resolution.

I-B FEDERAL PREEMPTION OF STATE ACTION

The question as to federal preemption in foreign air commerce versus a state's right to impose burdens on foreign commerce is substantial.

The doctrine of preemption has its genesis in the Supremacy Clause of the United States Constitution, which states:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made or which shall be made, under the authority of the United States, shall be the Supreme Law of the Land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

Recognizing that the Tenth Amendment to the Constitution reserves states' rights not delegated by the Constitution, the question is what act(s) are preempted in this case before the Court.

Preemption of a state's right to tax aviation fuel was recognized by the learned trial judge, Ben C. Willis, in this case when he adopted the reasoning in a companion case saying:

> The Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3, vests with Congress the exclusive power to regulate foreign commerce. The Supremacy Clause, Article 4, Section 2, states that the Constitution and the laws made pursuant thereto are the supreme law of the land. Therefore, when Congress traditionally regulates in a certain area such as the present case by extending reciprocal agreements to foreign airlines to strengthen even more the cultural welfare and economic bonds ... and ensure continued development in the common welfare on basis of equality and reciprocity [citation omitted], the *states are preempted or superseded from acting in this area.* (emphasis added)

Lineas Aereas Costarricenses, S.A. v. State of Florida, Department of Revenue, No. 83-964 (2d Judicial Circuit, Florida, June 1, 1983), pp. 2 & 3 of Final Judgment.

Judge Willis clearly recognized what this Court has previously stated. It is clear that even absent manifestations of congressional intent to occupy the field in enacting legislation, supremacy clause requires invalidation of any state legislation that burdens or conflicts in any manner with any federal law or treaty. *De Canas v. Bica,* 424 U.S. 351, 357 n. 5, 96 S.Ct. 933, 47 L.Ed.2d 43 (1976). The power of the United States government to remove obstructions to foreign commerce is superior to that of the states to provide for the welfare of their inhabitants and in matters where states may act the acts of Congress override what they have done. In matters where the national interest is eminent, even where Congress is silent, the states may not act at all. *Sanitary Dist. of Chicago v. United States,* 266 U.S. 405, 45 S.Ct. 176, 69 L.Ed. 352 (1925).

The United States government formally entered into the regulation of foreign air commerce with other nations when it became a party to the Convention on International Civil Aviation (Chicago Convention). The Chicago Convention was executed by the United States on December 7, 1944 and was duly ratified and approved as a treaty by the United States Senate on August 9, 1946. T.I.A.S. No. 1591.

In addition to the Chicago Convention, Congress enacted the Federal Aviation Act of 1958 which contains specific provisions authorizing only the Civil Aeronautics Board to grant foreign air carriers the privilege of entering the United States. 49 U.S.C. 1372 (1982). Such entry is restricted to foreign commerce. By federal law, foreign air carriers are denied the privilege of entering interstate or intrastate commerce.

Each Appellant, during the times material in this proceeding, was lawfully permitted by the CAB and was restricted to foreign commerce by virtue of federal law.

The government of Jamaica has expressed substantial concern with the State of Florida's attempted breach of their International Agreement with the United States. On September 17, 1984 the Ministry of Foreign Affairs of Jamaica presented to the Embassy of the United States a diplomatic message requesting the United States

to comply with the valid International Agreement.[3] The government of Jamaica clearly recognizes the national government of the United States but does not understand the ability of a state to interfere with foreign relations. Jamaica's conceptual understanding is at the heart of the Supremacy Clause. Florida's tax in certain circumstances is an indirect tax on foreign governments. Appellants, Air Jamaica, Caribbean Air Cargo and Guyana Airways are substantially owned by governments of their domicile. Florida, by its legislative process, is attempting to burden an area of foreign commerce in which Congress and the Executive Branch have previously acted both by treaty and federal statute. Florida's gasoline fuel tax on foreign air commerce is an unlawful entry into the federal government's exclusive domain and is a question of such substantial nature that foreign nations and the Executive Branch of the United States can be done great harm if the situation is not remedied.

II. FLORIDA SALES TAX ON AVIATION FUEL IS A VIOLATION OF THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION

Article I, Section 8, Clause 3, of the United States Constitution provides that Congress shall "regulate commerce with foreign nations and among the several states." The commerce clause acts as a limitation upon a state's power to tax. Although interstate commerce is not immune from taxation, when the tax operates to regulate commerce between the states to an extent that interferes with the authority conferred on Congress, the tax exceeds constitutional limits.

In *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977), this Court set forth a four prong test under which local tax laws are scrutinized. A tax on interstate commerce cannot be sustained unless the tax: 1) is applied to an

---

[3] MFA's Note No. 358/505.50, Sept. 17, 1984, Aviation Fuel Taxes p. 128, *infra*.

activity with a substantial nexus with the taxing state; 2) is fairly apportioned; 3) does not discriminate against interstate commerce; and 4) is fairly related to services provided by the state. *Complete Auto Transit*, 430 U.S. at 287. A state tax which impacts on interstate commerce and fails to withstand scrutiny under any of the four prongs stated in *Complete Auto Transit* is unconstitutional.

Senate Bill 8A, fails to meet at least one of the four prongs of the *Complete Auto Transit* test. Senate Bill 8A creates a road-user tax on interstate commerce. If the legislature had enacted the tax on road users, this tax would sustain a challenge under the four prong test. However, the legislature created a road-user tax on air carriers who do not use the highway system in Florida.

Once the revenues are received from the tax in question, they are deposited into the Gas Tax Collection Trust Fund authorized by Fla. Stat. §206.45 (1983). After deduction and refunds for service charges, all but $2,800,000 annually is transferred to the State Transportation Trust Fund. The $2,800,000 is transferred to the Department of Natural Resources to be used for ". . . eradication of, control of, and research of water hyacinths and noxious aquatic vegetation." FLA. STAT. §212.69(3) (1983).

Based on the statutory accounts of the State Transportation Trust Fund found in Fla. Stat. §339.081 (1983), the tax revenues accrue solely to the Division of Road Operations of the Department of Transportation. Monies accruing to the Division of Road Operations shall be restricted to the following purposes: construction of roads, maintenance of roads, preliminary engineering plans, compensation of certain employees of the Division of Road Operations and administrative expenses. FLA. STAT. §339.08 (1983). Thus, Senate Bill 8A fails to pass the fourth prong of *Complete Auto Transit* test because after tracing the flow of the tax revenues through the various statutory trust funds, no provisions are made for

aviation related purposes. The fourth prong of the *Complete Auto Transit* test, requires that the tax be related to the services provided by the state. Here the services are for the use of roads and not airports.

Senate Bill 8A also runs afoul of the foreign commerce aspect of the commerce clause. Under Article 1, Section 8, Clause 3, of the United States Constitution, Congress has the power to regulate commerce with foreign nations. Article II, Section 2, Clause 2, confers powers on the President with respect to foreign relations, and notes the Senate's role with respect to treaties.

In addition to the four prong test stated in *Complete Auto Transit,* this Court has identified two additional concerns in foreign commerce cases. The two additional prongs are the risk of international multiple taxation between the various foreign governments and the United States, and the risk of state interference with uniform national foreign policy. *Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434, 451, 99 S.Ct. 1813, 60 L.Ed.2d 336 (1979).

In *Lineas Aereas Costarricenses, S.A. v. State of Florida, supra,* a companion case, papers were filed evidencing the United States State Department's concern over Florida's interference with international relations. The State Department, expressing its concern that governments of foreign air carriers have questioned the appropriateness of Senate Bill 8A, has stated:

> Governments of a number of countries have recently brought to our attention that their airlines are required to pay state and local taxes on items for which the U.S. Government grants an exemption from federal taxes. Some foreign governments have questioned the appropriateness of imposing these state and local taxes on foreign air carriers in view of the generally-accepted and long-standing international practice of reciprocally exempting such items from taxes. A few such governments have raised the possibility that state and local authorities in their jurisdictions could impose similar taxes on U.S. Airlines. A proliferation of state and local taxes would frustrate the international system of reciprocal tax exemptions and thereby significantly increase the cost of international air transportation. See p. 126, *infra*.

As recent as September 17, 1984, the Government of Jamaica has requested the Government of the United States of America to take steps to comply with the provisions of the International Agreements between the respective countries and to secure an exemption from the tax for Air Jamaica. See p. 128, *infra*.

The real risk, as was noted in *Japan Line*, is that any retaliatory taxation by the affected foreign countries would impact on all U.S. carriers, not just Florida-based airlines:

> A state tax on instrumentalities of foreign commerce may frustrate the achievement of federal uniformity in several ways. If the state imposes an apportioned tax, international disputes over reconciling apportionment

> formulae may arise. If a novel state tax creates an asymmetry in the international tax structure, foreign nations disadvantaged by the levy may retaliate against American-owned instrumentalities present in their jurisdictions. Such retaliation of necessity would be directed at American transportation equipment in general, not just that of the taxing state, so that the nation as a whole would suffer. If other states follow the taxing state's example various instrumentalities of commerce could be subjected to varying degrees of multiple taxation, a result that would plainly prevent this nation from "speaking with one voice" in regulating foreign commerce. (footnote omitted)

Japan Line, 441, U.S. at 450-1.

The Florida tax runs counter to federal policy to obtain reciprocal exemptions from fuel taxation. The law also undermines our nation's credibility in asking other countries to maintain the exemptions for United States based airlines.

Therefore, the decision of the Supreme Court of Florida is inconsistent with the Commerce Clause of the United States Constitution. Since the decision of the Supreme Court of Florida is clearly inconsistent with paramount Federal law and paramount United States Supreme Court decisions, the question presented is so substantial as to require plenary consideration with briefs on the merits and oral argument for further resolution. Accordingly, we respectfully request that the Supreme Court of the United States take jurisdiction of this case.

III. FLORIDA SALES TAX ON AVIATION FUEL IS A VIOLATION OF THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE UNITED STATES CONSTITUTION

Senate Bill 8A, Part II of Chapter 212 provides that motorists, other highway users and airlines are taxed at 5% of an initially established price of $1.148 a gallon. The predetermined price remains in effect until June 1, 1985, when the price will be adjusted by the percentage change in the average monthly gasoline price component

of the Consumer Price Index (CPI) for the preceeding twelve month period.

At the trial it was stipulated that the Appellants paid approximately $.90 a gallon for aviation fuel in the State of Florida. The predetermined price of $1.148 a gallon, based on the average retail price for gasoline unlawfully discriminates against Appellants by arbitrarily imposing a higher fuel tax on common air carriers than on other purchasers of fuel. Other interstate common carriers are taxed at the rate of 5% of the actual cost of their fuel. FLA. STAT §212.08 (4)(a) (1983). By comparing the 5% tax paid on the actual cost of fuel by common carriers, other than common air carriers, to the tax paid by common air carriers at the $.90 a gallon actual cost, the common air carriers pay approximately 28% more tax.

It is recognized that a state may make distinctions in classes and may vary the rate of tax upon different products. However, there is a point where the state cannot go without violating the Equal Protection Clause of the United States Constitution. "The State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary." *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 527, 79 S.Ct. 437, 3 L.Ed.2d 480 (1959).

A corporation is a "person" within the meaning of the equal protection and due process clauses of the Fourteenth Amendment. *Fulton Market Cold Storage Co. v. Cullerton*, 582 F.2 1071, 1079 (7th Cir. 1978), cert. den. 439 U.S. 1121. Constitutional imperatives of the Equal Protection Clause cannot be satisfied by mere conjecture as to administrative convenience. *Frazer v. Manson*, 703 F.2d 30, 35 (2d Cir. 1983), Cert. den. 104 S.Ct. 339.

Likewise, the arbitrary fixed price of aviation fuel for tax purposes constitutes an illegal taking of property in violation of the Due Process Clause of the Fourteenth Amendment. *Norfolk & Western Railway Co. v. Missouri State Tax Commission*, 390 U.S. 317, 326-30, 88 S.Ct. 995, 19 L.Ed.2d 1201 (1968). Based on the fixed price at $1.148 a gallon, the Appellants pay approximately 28% more than they would if the tax was assessed on the actual cost of $.90 a gallon. The State of Florida, by utilizing the arbitrary fixed price of $1.148 a gallon, is illegally taking approximately 28% of the tax actually paid.

Senate Bill 8A also violates the Equal Protection Clause of the Fourteenth Amendment by creating a partial exemption for the sales tax on fuel purchases by common carriers, except common air carriers. Prior to Senate Bill 8A, all interstate common carriers were taxed only on fuel puchased based upon the ratio of the common carriers intrastate mileage to their total mileage. Senate Bill 8A, eliminated the proration of the tax for common air carriers. Other common carriers, i.e., trucks, vessels and trains, continue to pay fuel taxes based on cost (market price) and the taxes continue to be prorated to reflect only Florida use. FLA. STAT. §212.08 (4)(a) (1983).

No rational basis exists for the State of Florida to impose a more onerous fuel tax on common air carriers than other common carriers. In *Eastern Air Transport, Inc. v. South Carolina Tax Commission,* 285 U.S. 147, 52 S.Ct. 340, 76 L.Ed. 673 (1932), the Court addressed the question of whether a non-discriminatory tax upon local sales of fuel imposes a direct burden on interstate commerce. Although the above cited case did not address the Equal Protection Clause, the Court stated:

> There is no substantial distinction between the sale of gasoline that is used in an airplane in interstate transportation and the sale of coal for the locomotives of an interstate carrier, or of the locomotives and cars themselves bought as equipment for interstate transportation.

Eastern Air, 285 U.S. at 153. The invidious discrimination created by classifying airlines differently than other interstate common carriers cannot be justified as having a rational basis related to the classification. *Louisville & Nashville Railroad Co. v. Public Service Commission of Tennessee,* 389 F.2d 247 (6th Cir. 1968).

Therefore, the decision of the Supreme Court of Florida is inconsistent with the Equal Protection and Due Process Clauses of the United States Constitution. Since the decision of the Supreme Court of Florida is clearly inconsistent with paramount Federal law and paramount United States Supreme Court decisions, the question presented is so substantial as to require plenary consideration with briefs on the merits and oral argument for further resolution. Accordingly, we respectfully request that the Supreme Court of the United States take jurisdiction of this case.

Conclusion

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

J.C. O'STEEN, Esquire

THOMAS W. LAGER, Esquire
Lager, Woodward, & O'Steen
320 West Park Avenue
Tallahassee, Florida 32301
Counsel for Appellants

JERRY M. DALE, Esquire
8370 West Flagler
Miami, Florida 33144
of Counsel for Transportes
Aereos Mercantiles
Panamericas, S.A.; Aeronaves del Peru, S.A.;
Compania Peruana de Aviacion "Faucett", S.A.

and

MORTON H. SILVER, Esquire
P.O. Box 522965
Miami, Florida 33152
of Counsel for Aerovias
Colombianas Limitada;
Lineas Aereas del Caribe, S.A.;
TACA International Airlines, S.A.

Proof of Service

I, J. C. O'STEEN, depose and say that I am attorney in the office of Lager, Woodward & O'Steen, Attorneys of record for Appellants, AIR JAMAICA LIMITED; AEROVIAS COLOMBIANAS LIMITADA; CARIBBEAN AIR CARGO CO., LTD.; GUYANA AIRWAYS CORPORATION; LINEAS AEREAS del CARIBE, S.A.; TACA INTERNATIONAL AIRLINES, S.A.; COMPANIA PERUANA de AVIACION "FAUCETT" S.A.; AERONAVES del PERU, S.A.; TRANSPORTES AEREOS MERCANTILES PANAMERICANOS, S.A., and that on December _____, 1984, I served a copy of the foregoing Jurisdictional Statement on each of the parties required to be served herein, as follows:

On Appellee, STATE OF FLORIDA, DEPARTMENT OF REVENUE, by mailing copies in duly addresed envelopes, with first class postage prepaid, to LARRY E. LEVY, Esq., General Counsel, State of Florida, Department of Revenue, Room 203, Carlton Building, Tallahassee, Florida 32301; and to JOSEPH C. MELLICHAMP, Esq., Assistant General Counsel, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32301.

All parties required to be served have been served.

J.C. O'STEEN
Lager, Woodward & O'Steen
320 West Park Avenue
Tallahassee, FL 32301

Counsel for Appellants

Appendix

Opinion of the Supreme Court of Florida 28

Opinion of the trial court, Circuit Court for Second Judicial Circuit of Florida 31

Chapter 83-3 Laws of Florida 37

Motion for Rehearing 90

Denial of Motion for Rehearing 95

Notice of Appeal 98

Air Transport Services Agreement Between the United States of America and Jamaica, T.I.A.S. No. 6770 101

Air Transport Services Protocol Agreement Between the United States of America and Jamaica, T.I.A.S. No. 9613 102

Air Transport Agreement Between the Government of the United States of America and the Government of the Republic of Colombia, T.I.A.S. No. 5338 105

Agreement Between the Government of the United States of America and the Government of the United Kingdom Relating to Air Services Between their Respective Territories, T.I.A.S. No. 1507 107

Air Transport Agreement Between The Government of Barbados and the Government of the United States of America, T.I.A.S. No. 10370 109

Air Transport Agreement (Peru), T.I.A.S. 1587 112

Air Transport Agreement Between the Government of the United States of America and The Government of El Salavador, T.I.A.S. 10488 114

Lineas Aereas Costarricenses, S.A. v. State of Florida, (2nd Judicial Circuit, Florida, No. 83-964, June 1, 1983) 116

Correspondence dated September 29, 1982, from Department of State 126

Correspondence dated September 17, 1984, from the Ministry of Foreign Affairs, Jamaica 128

Supreme Court of Florida

No. 64,035

DEPARTMENT OF REVENUE, *Appellant,*

v.

AIR JAMAICA LTD., et al., *Appellees.*

(June 14, 1984)

ADKINS J.

This case is before us on an order from the First District Court of Appeal which certified the issues in this case to be of great public importance. We have jurisdiction. Art. V, §3(b)(5), Fla. Const.

This case arose with the filing of a complaint in circuit court in Leon County by the respondent Air Jamaica challenging the constitutionality of chapter 83-3, Laws of Florida. By order of the trial court the compliant was amended to include eleven other foreign airlines. The action was consolidated with a case filed by Wardair Canada for the purpose of trial. The parties stipulated to a briefing schedule and an early hearing date was obtained. A procedure was allowed which allowed the airlines to self-accrue the sales tax imposed under chapter 83-3 during the pendency of the proceedings subject to certain conditions.

The circuit court entered an order of final judgment on July 19, 1983, upholding the constitutionality of chapter 83-3 but ruling in favor of the airlines' assertion that they should be exempt from the tax by virtue of certain executive agreements between their countries and the United States. The trial judge had previously upheld the law in *Delta Air Lines, Inc. v. Department of Revenue,* No. 83-761 (Leon County Cir. Ct.—Civ. Div. May 23, 1983).

The Department of Revenue appealed the circuit court's holding recognizing an exemption for the foreign airlines. The airlines cross-appealed. We will discuss only those issues raised which have not been

previously determined by this Court in either *Eastern Air Lines Inc. v. Department of Revenue,* No. 63,949 (Fla. June 14, 1984); *Delta Air Lines v. Department of Revenue,* No. 63,915 (Fla. June 14, 1984); or *Department of Revenue v. Wardair Canada, Ltd.,* No. 64,036 (Fla. June 14, 1984).

The airlines challenge the law on the basis it unconstitutionally invades the exclusive powers of the executive and legislative branches to regulate foreign commerce by taxing commerce through a prohibited impost on exports. The airlines did not raise this issue in their pleadings or at oral argument in the circuit court. The department argues that the airlines are therefore precluded from raising the issue now. We agree. Nonetheless, we find that the law is not prohibited by the export-import clause of the federal constitution. The airlines attempt to apply federal statutes which are inapplicable to the excise tax in question. There is no basis for the airlines' conclusion that the tax violates the export-import clause. The airlines attempt unsuccessfully to distinguish the case of *Shell Oil Company v. State Board of Equalization,* 414 P.2d 820, 51 Cal. Rptr. 524 (1966); *appeal dismissed,* 386 U.S. 211 (1967). *Shell* indicates, without question, that the fuel at issue here is not an export because it is used to propel that aircraft and is not delivered to another country. Furthemore, the tax in question is imposed on the priviledge of the Florida vendor selling motor fuel or special fuel with the legal incident being on the first use or withdrawal from storage for use in the State of Florida. Florida is not attempting to tax the *instrument,* that is, the aircraft, of the foreign national while in Florida nor is it attempting to tax the process of exportation nor any fuel *for export.*

The airlines can also find no support for their position in *Richfield Oil Corp. v. State Board of Equalization,* 329 U.S. 69 (1946). That case involved the shipment of oil from this country "with the intention of uniting them to the mass of those belonging to some foreign country." *Id.* at 824. The oil was specifically sold for shipment abroad. At the time the tax was levied, the oil had clearly entered the process of exportation. This is not true of the present tax. The fuel is intended to be *used* by the airlines. It is not being purchased by the airline with the intent to transport it for sale abroad. We find no merit to the airlines' argument on this point.

The airlines have raised the argument that the tax is a direct violation of agreements between the United States and their respective countries. We faced a similar challenge to the law in our decision in

Department of Revenue v. Wardair Canada, Ltd., No. 64,036, (Fla. June 14, 1984). In the present case the airlines have not produced any facts which would enable us to hold contrary to our holding in *Wardair* where we found that the tax did not violate any international agreement. In addition, we find that none of the agreements expressly grant a most favored nation status when dealing with the issue of fuel and taxes as the airlines contend.

Accordingly, we affirm the order of the circuit court as to the constitutionality of chapter 83-3 except that portion of the law pertaining to a tax credit for Florida corporations. In *Delta* we determined that portion to be unconstitutional and it was stricken from the law. We reverse the circuit court to the extent that it recognized an exemption for foreign airlines.

It is so ordered.

ALDERMAN, C.J., BOYD and SHAW, JJ., Concur
OVERTON, J., Dissents: "I dissent. *See Department of Revenue v. Wardair Canada Ltd.*, No. 64,036 (Fla. June 14, 1984)."
McDONALD, J., Dissents

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Direct Appeal of Judgment of Trial Court, in and for Leon County, Ben C. Willis, Judge, Case No. 83-968 - Certified by the District Court of Appeal, First District, Case No. AU-73

Jim Smith, Attorney General and Joseph C. Mellichamp, III, Assistant Attorney General, Tallahassee, Florida; and Larry Levy, General Counsel and Stephen J. Keller, Assistant General Counsel, Department of Revenue, Tallahassee, Florida,

for Appellant

J.C. O'Steen and Thomas W. Lager of Lager, Woodward and O'Steen, Tallahassee, Florida; Douglas C. Kearney, Tallahassee, Florida; Morton H. Silver, Miami, Florida; and Jerry M. Dale, Miami, Florida,

for Appellees.

IN THE SECOND CIRCUIT COURT
IN AND FOR LEON COUNTY
FLORIDA

NO: 83-968

AIR JAMAICA LIMITED, a foreign corporation;
AEROMAR C. por A., a foreign corporation;
AEROVIAS COLOMBIANAS LIMITADA, a foreign corporation;
CARIBBEAN AIR CARGO CO., LTD; a foreign corporation;
GUYANA AIRWAYS CORPORATION, a foreign corporation;
HISPANIOLA AIRWAYS, C. por A., a foreign corporation;
LINEAS AEREAS del CARIBE, S.A., a foreign corporation;
TACA INTERNATIONAL AIRLINES, S.A., a foreign corporation;
COMPANIA PERUANA de AVIACION "FAUCETT", S.A., a foreign corporation;
AEROSERVICIOS ECUATORIANOS C.A., a foreign corporation
AERONAVES del PERU, S.A., a foreign corporation,
and
TRANSPORTES AEREOS MERCANTILES PANAMERICANOS, S.A., a foreign corporation,

Plantiffs,

-vs-

STATE OF FLORIDA, DEPARTMENT OF REVENUE,

Defendant.

FINAL JUDGMENT

This cause is before the Court on final hearing on the pleadings, evidence and arguments of counsel for the respective parties and the intervenors, and on the briefs of counsel for the parties, and the Court having considered all of same and being otherwise advised in the premises, it is

ORDERED AND ADJUDGED:

1. The Plaintiff asserts that Senate Bill No. 8A, Chapter 83-3, Laws of Florida, titled "an act relating to transportation finance and administration":

COUNT I: violates Article 8 of the Air Transport Services Treaty between the United States and Jamaica, regarding exemption of national excise tax on airline fuel and Article 10 of the Protocol Agreement regarding the parties using best efforts to exempt airline fuel from state and local taxes,

COUNT II: violates Article 5(5) and Article 6(2)(c) of the Protocol Agreement between the United States and Jamaica regarding discrimination and unfair competitive practices in relations to the corporate tax credit to domestic corporations,

COUNT III: violates the Double Taxation Treaty between the United States and Jamaica,

COUNT IV: violates the Air Transport Services Treaties between the United States and other foreign countries,

COUNT V: violates the General Agreement on Tariffs and Trade respecting most favored nation treatment and most favored nation treatment guaranteed by Plaintiffs' respective treaties,

COUNT VI: violates the Equal Protection and Due Process clauses of the United States Constitution and the Constitution of the State of Florida,

COUNT VII: violates the Commerce Clause of the United States Constitution,

COUNT VIII: is a special law in violation of Sections 10 and 11, Article III, of the Constitution of the State of Florida, and

COUNT IX: is an unconstitutional delegation of authority by the Florida Legislature.

2. This Court in *Delta Air Lines, Inc. v. State of Florida, Department of Revenue,* Case No. 83-761 (2d Cir. Fla., May 23, 1983), disposed of the allegations in Counts VI, VII, VIII, and IX and these allegations are likewise disposed of in this case, finding them without merit.

3.This Court in *Lineas Aereas Costarricenses, S.A. v. Department of Revenue,* Case No. 83-964 (2d Cir. Fla. June 1, 1983) ("LACSA"), disposed of the allegations in Counts I and IV and these allegations are likewise disposed of in this case, finding Senate Bill 8A inconsistent with the undertakings of the United States government in international bilateral agreements with Jamaica and the other foreign

countries the subject of this case, and recognizes an exemption from the fuel tax for Plaintiff and Intervenor foreign airlines who entered into the following bilateral executive agreements with the United States prior to the enactment of Senate Bill 8A:

(a) Jamaica - Air Transport Services Agreement, October 2, 1969, T.I.A.S. 6770 and Air Transport Services Protocol, April 4, 1979, T.I.A.S. 9613;

(b) Dominican Republic (AEROMAR C. por A., and HISPANIOLA AIRWAYS C. por A.) - Air Transport Services Agreement, July 19, 1979, T.I.A.S. 1955;

(c) Colombia (AEROVIAS COLOMBIANAS LIMITADA, LINEAS AEREAS del CARIBE, S.A., and TRANSPORTES AEREOS MERCANTILES PANAMERICANOS, S.A.) - Air Transport Services Agreement, October 24, 1956, T.I.A.S. 5338;

(d) Barbados (CARIBBEAN AIR CARGO CO, LTD) - Air Tranpsort Services Agreement between the United Kingdom and United States February 11, 1946, T.I.A.S. 1507, and Air Transport Services Agreement between Barbados and the United States, April 8, 1982, T.I.A.S. 10370;

(e) Guyana (GUYANA AIRWAYS CORPORATION) - Air Transport Services Agreement between the United Kingdom and United States February 11, 1946, T.I.A.S. 1507;

(f) El Salvador (TACA INTERNATIONAL AIRLINES, S.A.) - Air Transport Services Agreement, April 2, 1982, T.I.A.S. 10488,

(g) Peru (COMPANIA PERUANA de AVIACION "FAUCETT" S.A. and AERONAVES del PERU, S.A.) - Air Transport Services Agreement July 7, 1975, T.I.A.S. 8163 amending T.I.A.S. 1587, 4050, 6080 of December 27, 1946; and

(h) Ecuador (AEROSERVICIOS ECUATORIANOS C.A.) - Air Transport Services Agreement, April 24, 1947, T.I.A.S. 1606.

All the above agreements exempt the foreign airlines of that country from the imposition of national excise taxes on airline fuel: Jamaica - Article 8, Dominican Republic - Article 3(b), Colombia - Article 7, United Kingdom - Article 9(2), El Salvador - Article 9(2)(c), Ecuador - Article 3(c), for example. In addition, several of the agreements state that the national government will use "best efforts" to exempt the foreign airlines from state and local taxes: for example, Article 10(b) of Jamaica agreement, Article 9(5) United Kingdom agreement, Article 9(5) El Salvador agreement. Defendant claims the

"best efforts" provisions are executory and therefore not binding as treaties but are merely "unfulfilled promises". This Court finds this distinction irrelevant, as it is the federal policy in extending its best efforts that should be ascertained and not whether actual legislation is needed to enact this promise. As in the treaties cited in *LACSA*, supra, the agreements here guaranty a "fair and equal opportunity" to foreign airlines to operate on the designated routes and in the case of El Salvador "to compete in the international air transportation covered by this agreement", Article 11. Considering all these provisions together the intent of Congress and the President to exempt foreign airlines from all possible taxes and burdens becomes clear.

The language of the treaties in the present case parallels the language of the treaties in *LACSA*, supra. Further all the airlines involved herein have been licensed by the Civil Aeronautics Board. Therefore, for the same reasons of federal uniformity and to avoid reciprocal taxes on United States airlines, as stated in *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979) and the reasons in *LACSA*, this Court hereby grants a permanent injunction against the Defendant Department of Revenue from assessing and collecting fuel taxes pursuant to Senate Bill 8A on the airlines herein.

4. This Court finds that the allegations of Count II regarding the corporate tax credit and Count III regarding violation of the Convention between the United States and Jamaica on Double Taxation, May 21, 1980, T.I.A.S. 10206, are irrelevant in light of the foregoing. In any case, whether the foreign airlines pay a corporate income tax, can qualify to pay such tax, or are disadvantaged by not receiving a tax credit are issues which are beyond the neccessary findings at this time.

5. Plaintiff contends that the Jamaica treaty is the broadest insofar as rights and privileges and that because its treaty has been violated and Jamaica exempt from the Senate Bill 8A fuel tax, that the other intervenor nations are likewise exempt because of their status as "most favored nations". Most favored nations status is a doctrine that requires the same treatment be afforded to all contracting nations as is afforded to the most favored nation. This status is granted to all the intervenor nations either pursuant to individual treaties between the United States and those nations or because those nations are signatory to the General Agreement on Trade and Tariff, October 30,

1947, T.I.A.S. 1700 which provides that all signatories are most favored nations. Dominican Republic, Peru, Ecuador, Guyana, El Salvador and Barbados have "most favored nation" language in their individual treaties. Barbados, Colombia, Dominican Republic, Guyana, Jamaica, and Peru are signatories to the General Agreement on Trade and Tariff. Although the dispositive issue and primary concern here is whether Senate Bill 8A is inconsistent with the national policy in extending fuel tax exemption to foreign airlines and not whether a nation qualifies for most favored treatment, the fact that Congress would make such a provision for these countries certainly adds weight to the indication of Congress' intent to treat these nations equally and with favored status. As stated in *LACSA,* supra, this Court finds that the national policy and the intent of Congress clearly indicate exemption of foreign airlines from said fuel tax and therefore overrides the state power to implement such a tax. This finding is based on the treaties cited previously, and it is not absolutely necessary for the other foreign nations to come under the umbrella of the Jamaica treaty as most favored nations in order to receive this exemption. The fact that they are most favored nations, however, lends support to this finding. This Court finds that Senate Bill 8A does not specifically violate the General Agreement on Tariffs and Trade or the treatment guaranteed most favored nations, only that these agreements indicate the general inclination and federal policy to exempt these nations and "speak with one voice" in dealing with foreign nations.

ACCORDINGLY, IT IS FURTHER ORDERED AND ADJUDGED:

A. This Court finds and determines that Chapter 83-3, Laws of Florida, also referred to as Senate Bill 8A, is a valid enactment and is not in conflict with the Equal Protection or Due Process clauses of the United States Constitution nor the Florida Constitution nor with the Commerce Clause of the United States Constitution for the reasons stated in *Delta Air Lines,* supra.

B. It is further found that Senate Bill 8A is inconsistent with the undertakings of the United States government in international bilateral agreements with Plaintiff and Intervenor foreign airlines.

C. Plaintiff's Counts VI, VII, VIII, and IX are hereby dismissed finally.

D. Plaintiff's Counts I, IV and V are found to have merit and Plaintiff and Intervenors are granted a permanent injunction against Defendant Department of Revenue from assessing and collecting fuel taxes pursuant to Senate Bill 8A.

E. This Court upholds the constitutionality of Senate Bill 8A, but recognizes an exemption from the fuel tax for Plaintiff and Intervenor foreign airlines who entered executive agreements with the United States prior to the enactment of this bill.

F. Counts II and III are found to be irrelevant in light of the foregoing and are therefore not dealt with at time.

DONE AND ORDERED, at Tallahassee, Leon County, Florida, this 19th day of July, 1983.

Ben C. Willis Circuit Judge

Copies to:

Larry Levy, Esquire
J.C. O'Steen, Esquire
Morton H. Silver, Esquire
Jerry M. Dale, Esquire

Chapter 83-3 Laws of Florida

A bill to be entitled An Act relating to transportation finance and administration; adding subsections (21) and (22) to s. 212.02, Florida Statutes, 1982 Supplement; amending s. 212.05(1), Florida Statutes, 1982 Supplement, and adding Subsection (4); amending s. 212.055 (1), Florida Statutes, as amended; amending ss. 125.0165(1) and 212.06(4), Florida Statutes, 1982 Supplement; creating part II of chapter 212, Florida Statutes; providing for the imposition of the tax on sales, use, and other transactions on the sale of motor and special fuels; providing that provisions which provide for the taxation of fuels used by certain vehicles licensed as common carriers, and vessels, engaged in interstate or foreign commerce on the basis of the ratio of intrastate to interstate mileage do not apply to aircraft; providing legislative intent, providing definitions; specifying that the tax is upon the ultimate retail consumer; providing that the tax be paid upon the first sale or transfer of title; requiring that the tax be added to the sale price and stated separately on sales slips and invoices and prohibiting distributors, dealers, retail dealers, and retailers from claiming that they will absorb the tax; providing penalties; directing the Department of Revenue to determine the applicable tax per gallon of fuel annually; requiring retailers to display a notice with respect to such tax; providing for consolidated reporting of the tax and taxes due under chapters 206 or 207; providing for the relationship between parts I and II of chapter 212 and providing for applicability of specified administrative and penalty provisions of chapter 206 to part II of chapter 212; exempting dealer to dealer sales of special fuel; providing for refunds for fuel used for public transit systems, for losses due to evaporation and shrinkage, for fuel used by a municipality, county, or school district in vehicles operated by it, and for fuel used for agricultural and commercial fishing purposes; providing for administration of refunds; requiring a bond under certain circumstances; requiring permits; providing for records; providing penalties; providing for transfer of a portion of the revenues from said tax to the Department of Natural Resources for aquatic weed control; providing an exemption for gasohol for a specified period; providing for distribution of the proceeds of the tax to the State Transportation Trust Fund; requiring that a portion of the proceeds be allocated for public transit and rail capital projects,

Coding: bracketed words are deletions from existing law; words in italic are additions.

unless otherwise provided in the General Appropriations Act; providing that the discretionary sales tax which certain charter counties are authorized to adopt shall not apply to motor and special fuels; amending s. 206.41(1), Florida Statutes, and repealing subsections (3) and (4); repealing the first gas tax on motor fuel and designating the second gas tax as the "constitutional gas tax"; renaming the additional seventh-cent tax as the "county tax on motor fuel" and the additional eighth-cent tax as the "municipal tax on motor fuel"; directing that conforming statutory changes be made; amending s. 206.87(1), Florida Statutes, and repealing subsection (3); providing that the excise tax on special fuel shall be 4 cents per gallon; deleting provisions which specify that the excise tax on motor and special fuel is on the ultimate consumer, shall be added to the sale price by the distributor or dealer, and stated separately on bills; amending ss. 207.003, 207.005(2) and (3), and 207.026, Florida Statutes; providing for inclusion of the sales tax in the calculation of the tax due under the Florida Special Fuel and Motor Fuel Use Tax Act of 1981; excluding the sales tax from a credit thereunder; including distribution of the sales tax in provisions for allocation of said tax; amending ss. 206.05(1) and 206.90(1), Florida Statutes; revising limits of bond required of licensed distributors and dealers of motor and special fuel; amending ss. 206.43(1) and 206.91(1), Florida Statutes; revising the distributor's and dealer's credits for collecting said taxes on motor and special fuel; repealing ss. 206.29-206.40, Florida Statutes, which authorize a refund of 4 cents of said taxes on fuel used for city transit systems; repealing s. 206.415, Florida Statutes, which authorizes an exemption from the first gas tax for gasohol, and ss. 206.602 and 206.603, Florida Statutes, which provide for certain reimbursment and refunds with respect to the gasohol exemption; amending s. 206.42, Florida Statutes; providing that certain aviation motor fuel is not exempt from the sales tax; amending s. 206.46, Florida Statues; specifying that moneys in the State Transportation Trust Fund shall be used for transportation purposes; repealing ss. 206.50-206.55, Florida Statutes, which authorize a refund to retail dealers for evaporation and shrinkage; repealing ss. 206.57 and 206.58, Florida Statutes, relating to tax on fuel in reserve motor vehicle reservoirs and penalties for nonpayment; amending s. 206.625, Florida Statutes; amending ss. 206.64 and 206.70(1), Florida Statutes; repealing ss. 206.65-206.76, Florida Statutes, deleting references to the

first gas tax in provisions relating to return of tax paid by a municipality on motor fuel used in vehicles operated by it and provisions relating to refunds on fuel used for agricultural or commercial fishing purposes; deleting certain administrative provisions; providing for return of the county gas tax paid by a county or school district on motor fuel used in vehicles operated by it and providing for uses of the revenues; repealing s. 213.11, Florida Statutes, which provides for transfer of a portion of first gas tax revenues to the Department of Natural Resources for aquatic weed control; amending s. 215.22(1), (2), and (17), Florida Statutes, and adding subsection (21); authorizing certain deductions from sales tax revenues on motor and special fuel deposited in the Gas Tax Collection Trust Fund; and from the Local Option Gas Tax Trust Fund; amending s. 339.08, Florida Statutes, 1982 Supplement, and s. 339.081(1)(a), Florida Statutes; providing for use of the moneys in the State Transportation Trust Fund and for the accounts therein; amending s. 339.10(2), Florida Statutes, authorizing advances of proceeds of the sales tax on motor and special fuel; amending s. 339.24(3), Florida Statutes; authorizing expenditure of such proceeds for roadside parks and similar facilities; amending ss. 18.11(1)(f), 123.04(2), 206.45, 206.47, 206.875(2), 206.97, 215.36, 215.74, 336.41(3), 339.083(2), 339.089(1), 344.17, 348.217(10) and (11), 348.219(3)(g) and (k), 348.22(1), (3)(a), and (4), 348.221(2)(b), 348.222(4) and (5), 348.81(10), and 348.951(10), Florida Statutes, and s. 215.47(1)(d), Florida Statutes, 1982 Supplement; revising provisions relating to the excise tax on motor and special fuels, financial matters, transportation finance, and expressway authorities; conforming and correcting language; correcting cross references; amending s. 320.08(2), (3)(a), (b), (c), and (4)(c), (d), and (e), Florida Statutes, 1982 Supplement, increasing the license taxes on certain automobiles, trucks, truck-tractors, semitrailers, and automobiles and trailers for hire; amending s. 320.20, Florida Statutes; revising distribution of the proceeds of motor vehicle license taxes; amending s. 336.021(1) and (2), Florida Statutes, 1982 Supplement; revising provisions which authorize counties to levy an additional tax on motor and special fuel for transportation purposes subject to referendum; renaming the trust fund into which proceeds are transferred; creating s. 336.025, Florida Statutes, authorizing imposition of a local option tax on motor and special fuel to be used

for transportation expenditures under certain circumstances; providing requirements and time limitations; authorizing the county and municipalities to participate in the distribution of proceeds thereof; providing distribution requirements; providing for notification to the Department of Revenue and for resolution of disputes; providing for collection and for application of administrative and penalty provisions of chapter 206; specifying that certain refund provisions shall not apply to the tax; providing eligibility requirements; imposing transitional taxes on certain motor and special fuel held in inventory on April 1, 1983; providing penalties; providing for distribution of the proceeds; exempting the Department of Revenue from certain statutory requirements for a specified period; providing an appropriation; providing that, unless determined otherwise, 10 percent of the amounts expended from the State Transportation Trust Fund shall be expended with small businessess owned by socially and economically disadvantaged individuals; amending ss. 220.02(9) and 220.13(1)(a), Florida Statutes, 1982 Supplement, and creating s. 220.189, Florida Statutes; providing a credit against the corporate income tax in an amount of one-half the tax paid under part II of chapter 212 or $5 million, whichever is less, for certain airline carriers; repealing ss. 212.92(1)(c) and (d) and 206.625, Florida Statutes, relating to return of certain portions of taxes on motor fuel to counties, municipalities, and school districts, effective October 1, 1983; amending s. 341.051(2)(a), (3) and (4)(a), Florida Statutes, relating to financing of public transit projects; providing limitations on planned department participation; deleting certain limitations on expenditures and appropriation of funds; providing effective dates.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsections (21) and (22) are added to section 212.02, Florida Statutes, 1982 Supplement, to read:

212.02 Definitions.—The following terms and phrases when used in this chapter shall have the meaning ascribed to them in this section, except where the context clearly indicates a different meaning:

(21) "Motor fuel" means and includes what is commonly known and sold as gasoline and fuels containing a mixture of gasoline and other products."

(22) "Special fuel" means any liquid product, gas product, or combination thereof used in an internal combustion engine or motor to propel any form of vehicle, machine, or mechanical contrivance. This term shall include, but not be limited to, all forms of fuel commonly or commercially known or sold as diesel fuel, kerosene,

butane gas, or propane gas, and all other forms of liquefied petroleum gases.

Section 2. Subsection (1) of section 212.05, Florida Statutes, 1982 Supplement, is amended, and subsection (4) is added to said section, to read:

212.05 Sales, storage, use tax.—It is hereby declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of selling tangible personal property at retail in this state, or who rents or furnishes any of the things or services taxable under this chapter, or who stores for use or consumption in this state any item or article of tangible personal property as defined herein and who leases or rents such property within the state.

(1) For the exercise of such privilege, a tax is levied on each taxable transaction or incident, which tax is due and payable; according to the applicable brackets set forth in s. 212.12 as follows:

(a) 1. At the rate of 5 percent of the sales price of each item or article of tangible personal property when sold at retail in this state, computed on each taxable sale for the purpose of remitting the amount of tax due the state, and including each and every retail sale. Each occasional or isolated sale of an aircraft, boat, or motor vehicle of a class or type which is required to be registered, licensed, titled, or documented in this state or by the United States Government shall be subject to tax at the rate provided in this paragraph.

2. This paragraph does not apply to the sale of a boat by or through a registered dealer under this chapter to a purchaser who removes such boat from this state within 10 days after the date of purchase or, when the boat is repaired or altered, within 10 days after completion of such repairs or alterations. In no event shall the boat remain in this state more than 90 days after the date of purchase. This exemption shall not be allowed unless the seller:

a. Obtains from the purchaser within 90 days from the date of sale written proof that the purchaser licensed, registered, or documented the boat outside the state;

b. Requires the purchaser to sign an affidavit that he has read the provisions of this section; and

c. Makes the affidavit a part of his permanent record. In the event the purchaser fails to remove the boat from this state within 10 days after purchase or, when the boat is repaired or altered, within 10 days after completion of such repairs or alterations, or permits the boat to return to this state within 6 months from the date of departure, the purchaser shall be liable for use tax on the cost price of the boat and, in

addition thereto, payment of a penalty to the Department of Revenue equal to the tax payable. This penalty shall be in a lieu of the penalty imposed by s. 212.12(2) and is mandatory and shall not be waived by the department.

(b) At the rate of 5 percent of the cost price of each item or article of tangible personal property when the same is not sold but is used, consumed, distributed, or stored for use or consumption in this state.

(c) At the rate of 5 percent of the gross proceeds derived from the lease or rental of tangible personal property, as defined herein, except the rental of motion-picture film when an admission is charged for viewing such film and except the lease or rental of a motor vehicle to one lessee or rentee for a period of not less than 12 months when tax was paid on the acquisition of such vehicle by the lessor, when the lease or rental of such property is an established business or part of an established business or the same is incidental or germane to such business.

(d) At the rate of 5 percent of the lease or rental price paid by lessee or rentee, or contracted or agreed to be paid by lessee or rentee, to the owner of the tangible personal property.

(e) At the rate of 5 percent on charges for all telegraph messages and long distance telephone calls beginning and terminating in this state; or recurring charges to regular subscribers for local telephone service and for wired television service; on all charges for the installation of telephonic, wired television, and telegraphic equipment; and on all charges for electrical power or energy. Telephone and telegraph services originating within this state and completed outside this state or originating outside this state and completed within this state are not taxable. The provisions of s. 212.17(3), regarding credit for tax paid on charges subsequently found to be worthless, shall be equally applicable to any tax paid under the provisions of this section on charges for telephone and telegraph services and electric power subsequently found to be uncollectible. The word "charges" in this paragraph shall not include any excise or similar tax levied by the Federal Government, any political subdivision of the state, or any municipality upon the purchase or sale of telephone, wired television, or telegraph service or electric power, which tax is collected by the seller from the purchaser.

(f) At the rate of 5 percent on the sale, rental, use, consumption, or storage for use in this state of machines and equipment and parts and accessories therefor used in manufacturing, processsing,

compounding, producing, mining, or quarrying personal property for sale or to be used in furnishing communications, transportation, or public utility services.

(g) At the rate of 5 precent of the price, as determined pursuant to part II, of each gallon of motor fuel or special fuel taxable pursuant to said part, except that motor fuel and special fuel expressly taxable under this part shall be taxed as provided in paragraphs (a) and (b).

(4) The tax imposed pursuant to this part shall be due and payable according to the brackets set forth in s. 212.12.

Section 3. Subsection (1) of section 212.055, Florida Statutes, as amended by chapter 82-154, Laws of Florida, is amended to read:

212.055 Discretionary tax; charter counties; administration and collection.—

(1) Each charter county which adopted a charter prior to June 1, 1976, may levy, subject to the provisions of s. 125.0165, a discretionary 1-percent tax on all 3 or 5 percent taxable transactions under the provisions of this chapter, except that the sales amount above $1000 of any one transaction shall not be taxable, *and except that such discretionary tax shall not apply to the sale of motor fuel and special fuel as defined in s. 212.02(21) and (22).*

Section 4. Subsection (1) of section 125.0165, Florida Statutes, 1982 Supplement, is amended to read:

125.0165 Discretionary sales tax; adoption; application of revenue.—

(1) Subject to the provisions of this section and pursuant to the provisions of s. 212.055, the governing authority in each charter county which adopted a charter prior to June 1, 1976, is authorized to levy a discretionary additional 1-percent tax on all 3 percent or 5-percent taxable transactions under the provisions of chapter 212 for the purposes of development, construction, equipment, maintenance, operation, supportive services, and related costs of a fixed guideway rapid transit system. However, the sales amount above $1,000 of any one transaction shall not be taxable, *and the discretionary tax shall not apply to the sale of motor fuel and special fuel as defined in s. 212.02(21) and (22).*

Section 5. Subsection (4) of section 212.08, Florida Statutes, 1982 Supplement, is amended to read:

212.08 Sales, rental, storage, use tax; specified exemptions.—The sale at retail, the rental, the use, the consumption, the distribution, and

the storage to be used or consumed in this state of the following tangible personal property are hereby specifically exempt from the tax imposed by this chapter.

(4) EXEMPTIONS, ITEMS BEARING OTHER EXCISE TAXES, ETC.—Also exempt are water (not exempting mineral water or carbonated water), and all fuels used by a public or private utility, including any municipal corporation or rural electric cooperative association, in the generation of electric power or energy for sale. *Fuel other than motor fuel and special fuel is taxable as provided in this part, except that fuel expressly exempt herein,* and Motor fuels and special fuels on which a tax is imposed by chapter 206 or chapter 207 *are taxable as provided in part II.* All other fuels are taxable, except that those used by vehicles, *other than aircraft,* which are licensed as common carriers by the Interstate Commerce Commmission or by the Civil Aeronautics Board to transport persons or property in interstate or foreign commerce and vessels used to transport persons or property in interstate or foreign commerce are taxable *under this part* only to the extent provided herein. The basis of the tax shall be the ratio of intrastate mileage to interstate or foreign mileage traveled by the carrier during the previous fiscal year of the carrier, such ratio to be determined at the close of the carrier's fiscal year. This ratio shall be applied each month to the total purchases made in the state of gasoline and other fuels to establish that portion of the total used and consumed in intrastate movement and subject to tax under this chapter. Alcoholic beverages and malt beverages are not exempt. The terms "alcoholic beverages" and "malt beverages" as used in this subsection shall have the same meaning ascribed to them in ss. 561.01(4) and 563.01, respectively. It is determined by the Legislature that the classification of alcoholic beverages made in the subsection for the purpose of extending the tax imposed by this chapter is reasonable and just; and it is intended that such tax be separate from, and in addition to, any other tax imposed on alcoholic beverages.

Section 6. Part II of Chapter 212, Florida Statutes, consisting of sections 212.60, 212.65, 212.70, 212.80, 212.90, 212.91, 212.92, 212.94, and 212.95, is created to read:

212.60 Legislative findings and intent—

(1) It is the intent of the Legislature that sales of motor fuel and special fuel shall be subject to the tax imposed by this chapter. However, in recognition of the unique business practices which characterize the sale of such fuel at the retail level, and of the existing public and private sector administrative structures which exist pursuant to chapter 206 for the collection of the motor fuel and special fuel excise tax, the Legislature hereby provides a method of imposing and collecting the sales tax on such fuel in a manner least likely to increase public and private costs of tax collection and administration.

(2) The Legislature hereby finds and declares that as a matter of convenience and necessity, the sales tax applicable to motor fuel and special fuel shall be levied and collected as provided exclusively in this part. Provisions of part I shall be applicable to the taxation of motor fuel and special fuel only by express reference to such fuels and this part.

212.65 Definitions.—As used in this part:

(1) "Distributor" means any person who holds a valid license as a distributor of motor fuel, issued by the department pursuant to s. 206.03, and who:

(a) Imports, or causes to be imported, and sells at wholesale, retail, or otherwise, within this state, any motor fuel;

(b) Imports and withdraws for use within this state by himself or others any motors fuel from the tank, car, truck, or other original container or package in which it was imported into this state;

(c) Manufactures, refines, produces or compounds any motor fuel within this state and sells the same at wholesale, retail, or otherwise within this state for use or consumption within this state;

(d) Imports into this state from any other state or foreign country or receives by any means into this state and keeps in storage in this state for a period of 24 hours or more after the same loses interstate character as a shipment in interstate commerce any motor fuel which is intended to be used for consumption in this state;

(e) Is primarily liable under the gas tax laws of this state for the payment of motor fuel taxes;

(f) Was holding, on December 30, 1970, an unrevoked license issued by the department to engage in business as a distributor of motor fuel; or

(g) Purchases or receives in this state for resale to dealers motor fuel upon which the tax has not been paid.

(2) "Dealer" means any person who holds a valid license as a dealer of special fuel, issued by the department pursuant to s. 206.89, and who:

(a) Imports and sells at wholesale, retail or otherwise within this state any special fuel;

(b) Imports, or causes to be imported, and withdraws for use within this state by himself or others any special fuel from the tank car, truck, or other original container or package in which it was imported into this state;

(c) Exports special fuel from this state to another state or foreign country;

(d) Manufactures, refines, produces, or compounds any special fuel within this state and sells the same at wholesale, retail, or otherwise within this state;

(e) Imports into this state from any other state or foreign country or receives by any means into this state and keeps in storage in this state for a period of 24 hours or more after the same loses interstate character as a shipment in interstate commerce any special fuel which is intended to be used in this state;

(f) Is primarily liable under the special fuel tax laws of this state for the payment of special full taxes;

(g) Purchases or receives in this state special fuel in bulk quantities for resale to service stations, to a user or another dealer, or to the ultimate consumer for nontaxable consumption upon which the tax has not been paid; or

(h) Has both a taxable use and nontaxable consumption of the same special fuel in this state. However, this paragraph shall not require a person to be a dealer when his only purchases of special fuel are delivered into reservoirs attached to motor vehicles to fuel internal combustion engines attached to said motor vehicles.

(3) "Retail dealer" means any person licensed pursuant to chapter 206 to sell motor fuel or special fuel at retail to the general public at posted retail prices.

(4) The definitions contained in a 212.02(1), (2), (3), (4), (7), (8), (9), (10), (11), (13), (17), (21), and (22) shall apply to the same terms as used in this part.

212.70 Tax imposed on sale of motor fuel and special fuel; tax upon ultimate consumer; determination by department; notification.—

(1) A tax shall be imposed for the privilege of the sale at retail in this state of motor fuel and special fuel.

(2)(a) This levy of tax is upon the ultimate retail consumer. It is hereby provided as a matter of administrative convenience and neccessity that the tax shall be paid upon the first sale or transfer of title within this state, whether by a distributor, dealer, or retail dealer, who shall act as agent for the state in the collection of said tax whether such distributor, dealer, or retail dealer is the ultimate seller or not.

(b) Distributors, dealers, and retail dealers shall add the amounts of the tax imposed under this part to the sale price and the tax shall be separately stated as Florida sales tax on charge tickets, sales slips, invoices, or other tangible evidence of sale to each subsequent purchaser. However, the sales tax imposed shall be disclosed to the ultimate retail consumer as provided in subsection (5).

(c) Distributors, dealers, retail dealers, or retailers shall not advertise or claim to the public by any manner whatsoever that they will absorb all or any part of the tax, that they will relieve the purchaser or ultimate consumer of any portion of the tax, or that a portion of such tax will be refunded.

(d) Any distributor, dealer, retail dealer, or retailer who violates the provisions of paragraph (b) or paragraph (c) shall be guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(3) Prior to June 1 of each year, the department shall determine the appropriate sales tax applicable to the retail price per gallon of motor fuel and special fuel as follows:

(a) The department shall determine the appropriate total motor fuel and special fuel retail price, including any federal, state and local excise taxes on such fuel, for the forthcoming 12-month period beginning June 1, by adjusting the initially established price by the percentage change in the average monthly gasoline price component of the Consumer Price Index, issued by the United States Department

of Labor, for the most recent 12-month period ending March 31, compared to said average for the 12-month period ending March 31, 1984. However, the adjustment provided herein shall first be made for the forthcoming 12-month period beginning June 1, 1985.

(b) The tax per gallon shall be computed as 5 percent of said total retail price, rounded to the nearest one-tenth of one cent.

(c) The initially established price is $1.148 per gallon.

(4)The department shall notify each distributor, dealer, and retail dealer of the amount of sales tax to be imposed and collected pursuant to this part on each gallon of motor fuel and special fuel for the 12-month period beginning June 1.

(5) Every retailer shall conspicuously display, on the outside housing of each pump or other dispensing device, a notice that the price stated on the pump includes applicable state sales taxes.

212.80 Tax remitted to department.—The taxes levied and assessed pursuant to this part shall be remitted to the department at the same time as motor fuel and special fuel taxes are required to be remitted under the provisions of chapters 206 or 207. The department shall prescribe forms which pride for consolidated reporting of taxes due under chapters 206 or 207 and this part.

212.90 Applicabilty of specified sections of chapter 206.—The provisions of ss. 206.055, 206.06, 206.07, 206.075, 206.08, 206.09, 206.10, 206.11, 206.12, 206.13, 206.14, 206.15, 206.16, 206.17, 206.175, 206.18, 206.19, 206.20, 206.204, 206.205, 206.21, 206.215, 206.22, 206.24, 206.28, 206.41(2), 206.44, 206.445, 206.48, 206.49, 206.56, 206.59, 206.87(2)(a), and 206.94 shall, as far as lawful or practicable, be applicable to the levy and collection of taxes imposed pursuant to this part as if fully set out herein.

212.91 Dealer to dealer sales.—The tax imposed in this part shall not be paid on special fuels, otherwise taxable herein, when sold by a licensed dealer to a licensed dealer.

212.92 Refunds—

(1) The following refunds shall apply to the tax imposed by this part, to the extent provided herein:

(a) Refunds on fuel used for local transit operations.—Any person who uses motor fuel on which the taxes imposed by this part have been paid for any system of mass public transportation authorized to operate within any city, town, municipality, county, or transit authority region in this state, as distinguished from any over-

the-road or charter system of public transportation, shall be entitled to a refund of said taxes. A public transportation system or transit system as defined above may operate outside its limits when such operation outside its limits is found necessary to adequately and efficiently provide mass public transportation services for the city, town, or municipality involved. A transit system as defined above includes demand service that is an integral part of a city, town, municipality, county, or transit or transportation authority system but does not include independent taxicab or limousine operations. "City" or "cities," "county" or "counties," and "authority" or "authorities" as used in this paragraph includes collectively or individually any city, town, municipality, county or transit or transportation authority organized in this state by virtue of any general or special law enacted by the Legislature.

(b) Retail dealers.—Every retail dealer shall be entitled to a refund of 1.4 percent of the tax imposed by this part on motor fuel purchased by such retail dealer to cover losses due to evaporation and shrinkage of motor fuel.

(c) Return of tax to municipalities and counties.—Those portions of the tax imposed by this part which result from the collection of such taxes paid by a municipality or county on motor fuel for use in a motor vehicle operated by it shall be returned to the governing body of each such municipality or county for the construction, reconstruction, and maintenance of roads and streets within the municipality or county.

(d) Return of tax to school districts.—Those portions of the tax imposed by this part which result from the collection of such tax paid by a school district or by a private contractor operating school buses for a school district, on motor fuel for use in a motor vehicle operated by such district or private contractor shall be returned to the governing body of each such school district to be used to fund construction, reconstruction, and maintenance of roads and streets within the school district required as a result of new school construction or renovation of existing schools. The school board shall select the projects to be funded; however, first priority shall be given to projects required as the result of new school construction, unless a waiver is granted by the affected county or municipal government.

(e) Refund to farmers and fishermen.—

1. For the purposes of this paragraph, "agricultural purposes" means motor fuel or special fuel used in any tractor, vehicle, or other farm equipment which is used exclusively on a farm or for processing farm products on the farm and no part of which is used in any vehicle or equipment driven or operated upon the public highways of this state. This restriction shall not apply to the movement of farm vehicles or farm equipment between farms. The transporting of bees by water and the operating of equipment used in the apiary of a beekeeper shall be also deemed an agricultural purpose.

2. For the purposes of this paragraph, "commercial fishing purposes" shall be construed to mean motor fuel or special fuel used in the operation of boats, vessels, and equipment used exclusively for the taking of fish, crayfish, oysters, shrimp, and sponges from the salt and fresh waters under the jurisdiction of the state for resale to the public, but shall in no way be construed to include fuel used for sports or pleasure fishing, no part of which is used in any vehicle or equipment driven or operated upon the highways of this state.

3. Any person who uses any motor fuel or special fuel for agricultural purposes or commercial fishing purposes on which the tax imposed by this part has been paid shall be entitled to a refund of said tax.

(2) Agents of the department are authorized to go upon the premises of any permitholder or distributor, or duly authorized agent thereof, as defined in this part to make inspection to ascertain any matter connected with the operation of this section or the enforcement thereof. However, no agent shall enter the dwelling of any person without the occupant's consent or the authority from a court of competent jurisdiction.

(3)(a) No person shall secure a refund under this section unless such person is the holder of an unrevoked refund permit issued by the department before the purchase of the motor fuel or special fuel, which permit shall be numbered and issued annually.

(b) To procure a permit, every person shall file with the department an application, on forms furnished by the department, stating that he is entitled to a refund according to the provisions of subsection (1) and that he intends to file an application for refund for the current calendar year, and shall furnish the department such other information as the department shall request.

(c) No person shall in any event be allowed a refund unless he has filed the application provided for in paragraph (b) with the department. The permit shall be effective on the date issued by the department and continuous from year to year so long as the permitholder files refund claims from year to year. In the event he fails to file a claim for any year, then he must apply for a new permit.

(d) The department may, if an applicant for a refund permit has violated any provision of this section or any regulation pursuant thereto, or been convicted of bribery, theft, or false swearing within the period of 5 years preceeding the application, or if the department has evidence of the applicant's financial irresponsibility, require the applicant to execute a corporate surety bond of $1,000 to be approved by the department, conditioned upon the payment of all taxes, penalties, and fines for which such applicant may become liable under this part.

(4)(a) When motor fuel or special fuel is sold to a person who claims to be entitled to a refund under this section, the seller of such motor fuel or special fuel shall, if the amount sold is not less than 26 gallons, make out a sales invoice, which shall contain the following information:

1. The name and post-office and resident address of the purchaser.

2. The number of gallons purchased.

3. The date on which purchase was made.

4. The price paid for such motor fuel or special fuel.

5. The name and place of business of the seller of the motor fuel or special fuel.

(b) The sales invoice shall be retained by the the purchaser for attachment to his application for refund, as a part thereof. No refund shall be allowed unless the seller executes such invoice and proof of payment of such taxes for which refund is claimed is attached. The department may refuse to grant a refund if the invoice is incomplete and fails to contain the full information required herein.

(c) No person shall execute a sales invoice, as described in paragraph (a), except a distributor, dealer, or retail dealer, or a duly authorized agent thereof. No refund invoices shall be executed for purchases from retail service stations.

(d) Nothwithstanding provisions of this subsection to the contrary, the department shall have authority to designate certain

retail service stations as agents of distributors or dealers when no distributors or dealers are available to serve commercial fishermen.

(5) The right to receive any refund under the provisions of this section shall not be assignable, except to the executor or administrator, or to the receiver, trustee in bankruptcy, or assignee in insolvency proceedings, of such person entitled thereto.

(6)(a) However, no refund shall be authorized unless sworn applications therefor containing such information as the department may determine are filed with it not later than January 31 immediately following the year for which refund is claimed. When claim is filed after January 31 and there is presented to the department a justified excuse for late filing and the last preceeding claim has been filed on time, such late filing may be accepted through February of the year filed. No refund shall be authorized for purchases of less than 26 gallons at any one time, and no refund shall be authorized unless the amount due is for $5 or more in any 12-month period and unless application is made upon forms prescribed by the department.

(b) Claims shall be paid annually on a calendar-year basis. The department shall deduct a fee of $2 for each claim, which $2 shall be deposited in the General Revenue Fund.

(7)(a) Each distributor, dealer or retail dealer shall, in accordance with the department's requirements, keep at his principal place of business in this state, or at the bulk plant where the sale is made, a complete record, or duplicate sales tickets, of all such motor fuel or special fuel sold by him for the refund provided in the section, which records shall give the date of each such sale, the number of gallons sold, the name of the person to whom sold, and the sale price. No distributor, dealer or retail dealer, or his agent or employee, shall acknowledge or assist in the preparation of any claim for tax refund.

(b) Every person to whom a refund permit has been issued under this section shall, in accordance with the department's requirements, keep at his residence or principal place of business in this state a record of each purchase of motor fuel or special fuel from a distributor, dealer, or retail dealer, or his authorized agent, the number of gallons purchased, the name of the seller, the date of purchase, and the sale price.

(c) The records required to be kept under this subsection shall at all reasonable hours be subject to audit or inspection by the department or by any person duly authorized by it. Such records shall be preserved and shall not be destroyed until 3 years after the date the

motor fuel or special fuel to which they relate was sold or purchased.

(d) The department shall keep a permanent record of the amount of refund claimed and paid to each claimant. Such records shall be open to public inspection.

(8)(a) If any taxes are erroneously refunded, the department shall advise the payee by registered mail of the erroneous refund. If the payee fails to reimburse the state within 15 days after the receipt of letter, an action may be instituted by the department against such payee in the circuit court, and the department shall recover from the payee the amount of the erroneous refund plus a penalty of 25 percent.

(b) No person shall knowingly make a false or fraudulent statement in an application for refund permit or in an application for refund of any taxes under this section; fraudulently obtain a refund of such taxes; knowingly aid or assist in making any such false or fraudulent statement or claim; or buy motor fuel or special fuel to be used for any purpose other than as provided in this section.

(c) The refund permit of any person who violates any provisions of this section shall be revoked by the department and may not be reissued until 2 years have elapsed from the date of such revocation. The refund permit of any person who violates any other provision of this part may be suspended by the department for any period, in its discretion, not exceeding 6 months.

212.94 Gasohol; exemption from tax imposed by this part.—The sale or distribution for use in this state of motor fuel which contains a minimum of 10 percent blend by volume of ethyl alcohol with a purity of 99 percent, commonly known as "gasohol," shall be exempt from the tax levied pursuant to this part as follows:

(1) Each gallon of such gasohol sold in this state shall be exempt from the entire tax imposed by this part from April 1, 1983, through June 30, 1985.

(2) Each gallon of such gasohol sold in this state shall be exempt from 50 percent of such tax from July 1, 1985, through June 30, 1987.

212.95 Distribution of proceeds.—

(1) Notwithstanding other provisions of law to the contrary, moneys collected pursuant to this part shall be deposited in the Gas Tax Collection Trust Fund created by s. 206.45. Said moneys, exclusive of the service charge imposed by s. 215.20, and exclusive of refunds granted pursuant to s. 212.92, shall be distributed monthly to

the State Transportation Trust Fund, except that $2,800,000 per year in equal monthly amounts shall be transferred to the Department of Natural Resources.

(2) Not less than 10 percent of the moneys deposited in the State Transportation Trust Fund pursuant to this section shall be allocated by the Department of Transportation for public transit and rail capital projects, including service development projects, as defined in s. 341.031(2) and (3), unless otherwise provided in the General Appropriations Act.

(3) All funds transferred herein to the Department of Natural Resources shall be used for eradication, control, and research of water hyacinths, and noxious aquatic vegetation.

Section 7. Paragraph (f) of subsection (1) of section 18.11, Florida Statutes, is amended to read:

18.11 Security to be given.—

(1) The security to be given by such banks as may be designated under ss. 18.10 and 18.101 shall consist of:

(f) Bonds, notes, or certificates of any county, board, commission, authority, agency, or other instrumentality of the state which contain a pledge of, and are solely payable from, the 80-percent surplus 2-cent *constitutional* [second] gasoline tax accruing under s. 16, Art. IX of the State Constitution of 1885, as adopted by the 1968 revised constitution and s. 9, Art. XII of said revision, provided that such securities have been approved by the State Board of Administration as to their legal and fiscal sufficiency.

Section 8. Subsection (2) of section 123.04, Florida Statutes, is amended to read:

123.04 Qualifications for retirement.—

(2) A board to consist of the Governor, the State Comptroller, and the State Treasurer shall be authorized and empowered to invest in bonds of the United States, in bonds the payment of which is secured by s. 16 of Art. IX of the Constitution of 1885, as adopted by the 1968 revised constitution or by s. 9, Art XII of said revision, in bonds the payment of which is secured by s. 18 of Art XII of the Constitution of 1885, as adopted by s. 9, Art. XII of the 1968 revised constitution, in county bonds containing a pledge of the full faith and credit of the county or district involved, provided that such bonds are approved by the State Board of Administration as to legal and fiscal sufficiency, in bonds of the Florida State Improvement Commission or

any other state agency, which have been approved as to legal and fiscal sufficiency by the State Board of Administration and which contain a sole pledge of the 80-percent surplus 2-cent *constitutional* [second] gasoline tax accruing under the provisions of s. 16 of Art. IX of the Constitution of 1885, as adopted by the 1968 revised constitution, or of s. 9, Art. XII of said revision, or in such other securities in which domestic life insurance companies are permitted to invest by Florida law any of the funds of the Judicial Retirement Trust Fund as they may deem necessary and feasible.

Section 9. Subsection (1) of section 206.05, Florida Statutes, is amended to read:

206.05 Bond required of licensed distributors.—

(1) Each distributor, except a municipality, county, school board, or special district which is licensed as a distributor under this part, shall file with the department a bond in a penal sum of not less than *$10,000* [$3,000] or more than *$100,000* [35,000], said sum to be approximately 3 times the average monthly gas tax paid by, or due from, such distributor during the preceding 12 calendar months under the laws of this state. The bond shall be in such form as may be approved by the department, executed by some surety company duly licensed to do business under the laws of the state as surety thereon, and conditioned upon the prompt filing of true reports and the payment by such distributor to the department of any and all gas taxes which are now or which hereafter may be levied or imposed by the state, together with any and all penalties and interest thereon, and generally upon faithful compliance with the provisions of the gas tax laws of the state. The distributor shall be the principal obligor, and the state shall be the obligee.

Section 10. Sections 206.32, 206.34, 206.36, 206.37, 206.38, and 206.40, Florida Statutes, and sections 206.29, 206.30, 206.31, 206.33, and 206.35, Florida Statutes, as amended by chapter 82-139, Laws of Florida, are hereby repealed.

Section 11. Subsections (3) and (4) of section 206.41, Florida Statutes, are hereby repealed, and subsection (1) of said section is amended to read:

206.41 *Constitutional gas tax* [Gasoline taxes] imposed.—

(1) An excise or license tax of *2* [6] cents per gallon, [herein termed "gas tax,"] is imposed upon every gallon of motor fuel sold in this state, or brought into this state for use, upon which such tax has

not been paid or the payment thereof has not been lawfully assumed by some person handling the same in this state. *This tax, which is the tax as levied by s. 16 Art. IX of the Constitution of 1885, as amended, and continued by s. 9(c), Art. XII of the 1968 Constitution, as amended, and which is therein referred to as the "second gas tax", is hereby designated the "constitutional gas tax."* This levy of tax [is upon the consumer but] shall be paid upon the first sale or transfer of title, or use, within this state whether by a distributor or dealer, except as expressly provided in subsection (2), who shall act as agent for the state in the collection of said tax whether he be the ultimate seller or not.

Section 12. Section 206.415, Florida Statutes, as created by chapter 80-77, Laws of Forida, is hereby repealed.

Section 13. Section 206.42, Florida Statutes, is amended to read:

206.42 Aviation motor fuel exempt from *excise* tax.—Each and every dealer in aviation motor fuel in the state by whatever name designated who sells aviation motor fuel testing 78 octane number (A.S.T.M. method D-357-33T) or higher, of such quality not adapted for use in ordinary motor vehicles, being designed for and sold and exclusively used for aircraft motors, is exempted from the payment of any and all excise taxes levied by the state upon such motor fuel, *except the tax levied under part II of chapter 212.*

Section 14. Subsection (1) of section 206.43, Florida Statutes, is amended to read:

206.43 Distributor to report to department monthly; deduction.—The taxes levied and assessed as provided in part I of this chapter shall be paid to the department monthly in the following manner:

(1) On or before the 20th day of each month the distributor shall mail to the department verified reports on forms prescribed by the department of the number of gallons of such products sold by him during the preceding month and shall at the same time pay to the department the amount of tax computed to be due. However, if the 20th day falls on a Saturday, a Sunday, or a federal or state legal holiday, returns shall be accepted if postmarked on the next succeeding workday. The distributor shall deduct from the amount of tax shown by the report to be payable an amount equivalent to *4* [2] percent of the tax on motor fuels *imposed by this part* not exceeding 500,000 taxable gallons, and less an amount equivalent to *2* [1] percent

of the tax on motor fuels *imposed by this part* in excess of 500,000 gallons but not exceeding 1 million taxable gallons, which is hereby allowed to the distributor on account of services and expenses in complying with the provisions of the law. However, this allowance shall not be deductible unless payment of tax is made on or before the 20th day of the month as herein required. The United States post-office date stamped on the envelope in which the report is submitted shall be considered as the date the report is received by the department.

Section 15. Section 206.45, Florida Statutes, is amended to read:

206.45 Payment of tax into State Treasury.—All moneys derived from the gas taxes imposed by part I of this chapter shall be paid into the State Treasury by the department, for deposit in the Gas Tax Collection Trust Fund, which fund is created and from which the following transfers shall be made:

[(1) The first gas tax shall, after witholding and transferring such funds as are required under the provisions of s. 212.11, and after withholding $50,000 to be used as a revolving cash balance in the "Gas Tax Collection Trust Fund," and except as provided in s. 206.625, be transferred into the "State Transportation Trust Fund," which fund is created for use as provided by law.]

(1)[a] The *constitutional* [second] gas tax shall be remitted to the State Board of Administration for distribution as provided in the Constitution.

(2)[3] *The county* [additional seventh-cent] gas tax collected pursuant to s. 206.60, as such may be amended by the 1971 Legislature, shall be distributed as therein provided.

(3) [4] The *municipal* [additional eighth-cent] gas tax collected pursuant to s. 206.605 shall be distributed as therein provided.

Section 16. Section 206.46, Florida Statutes, is amended to read:

206.46 State Transportation Trust Fund [construction etc., of roads].—All moneys in the State Transportation Trust Fund, *which is hereby created,* shall be used for *transportation purposes* [the construction and maintenance of state roads, as otherwise] provided by law, under the direction of the Department of Transportation, which department may from time to the time make requisition on the Comptroller for *such* funds [to pay for the construction and maintenance of state roads]. Money from said fund shall be drawn by the Comptroller by warrant upon the State Treasury pursuant to vouchers and shall be paid in like manner as other state warrants are paid out of the appropriated fund against which same are drawn. All

sums of money necessary to provide for the payment of the warrants by the Comptroller drawn upon said fund are appropriated annually out of the fund for the purpose of making such payments from time to time.

Section 17. Section 206.47, Florida Statutes, is amended to read:

206.47 Distribution of *constitutional* [second] gas tax pursuant to State Constitution.—

(1) The *constitutional* [second] gas tax shall be allocated among the several counties in accordance with the formula stated in s. 16 of Art. IX of the State Constitution of 1885, as amended, to the extent necessary to comply with all obligations to or for the benefit of holders of bonds, revenue certificates, and tax anticipation certificates or any refundings thereof secured by any portion of the *constitutional* [second] gas tax allocated under the provisions of s. 16, Art. IX of the State Constitution of 1885, as amended.

(2) The Department of Revenue will transmit the *constitutional* [second] gas tax as collected monthly to the State Board of Administration allocated and distributed to the credit of the several counties of the state based on the formula of distribution contained in s. 16, Art. IX of the Constitution of 1885, as amended.

(3) The State Board of Administration will calculate a distribution of the *constitutional* [second] gas tax received from the Department of Revenue under subsection (2), based on the formula contained in s. 9(c)(4), Art. XII of the revised State Constitution of 1968.

(4) The State Board of Administration shall allocate the *constitutional* [second] gas tax beginning with the tax collected January 1969 on the formula contained in s. 9(c)(4), Art. XII of the revised State Constitution of 1968, subject only to the debt service requirements of bonds pledging all or part of the *constitutional* [second] gas tax allocated under the provisions of s. 16, Art. IX of the State Constitution of 1885, as amended.

(5) The distribution factor, "the tax collected on retail sales or use in each county," shall be based upon a certificate of the Department of Revenue of the sales and use tax collected in each county as of June 30 for each fiscal year. The Department of Revenue shall furnish a certificate to the State Board of Administration on or before July 31 following the end of each fiscal year, and said certificate shall be conclusive as to the sales and use tax collected in each county for the

prior fiscal year. The factor based on said certificate shall be applied to the gas tax collections for the following fiscal year beginning July 1 and ending June 30.

(6) The State Board of Administration will calculate a monthly allocation of the *constitutional* [second] gas tax received from the Department of Revenue based on the formula contained in s. 9(c)(4), Art. XII of the revised State Constitution of 1968, and credit to the account of each county the amount of the *constitutional* [second] gas tax to be allocated under said formula.

(7) The gas tax funds credited to each county will be first distributed to meet the debt service requirements, if any, of the s. 16, Art. IX debt assumed or refunded by the State Board of Administration payable from the *constitutional* [second] gas tax. The remaining gas tax funds credited to each county are surplus gas tax funds and shall be divided, 80 percent to the Department of Transportation and 20 percent to the board of county commissioners of the county for the acquisition and construction of roads. As provided in s. 339.08(4), the department is authorized to maintain on deposit with the State Board of Administration all proceeds of the 80-percent surplus of the *constitutional* [second] gas tax.

(8) The State Board of Administration shall retain a reasonable percentage of the total surplus gas tax in an amount to be determined by the board in each fiscal year and shall hold said funds in a reserve account to make any adjustments required for the distribution of the gas tax for the fiscal year. Funds in the reserve account may be invested in direct obligations of the United States maturing not later than June 30 of each fiscal year.

(9) The State Board of Administration will, in each fiscal year, distribute the 80-percent surplus gas tax allocated to each county to the debt service requirements of each bond issue pledging the 80-percent surplus accruing to that county under the provisions of s. 16, Art. IX of the State Constitution of 1885, as amended. The remaining 80-percent surplus gas tax funds will be advanced monthly, to the extent practicable, to the Department of Transportation for use in the county.

(10) The State Board of Administration will, in each fiscal year, distribute the 20-percent surplus gas tax allocated to each county to the debt service requirements of each bond issue pledging the 20-perent surplus accruing to that county under the provisions of s. 16, Art IX of the State Constitution of 1885, as amended. The remaining

20-percent surplus gas tax funds will be advanced monthly, to the extent practicable, to the boards of county commissioners for use in the county.

(11) After receiving the gas tax collections for the 12th month of each fiscal year, the State Board of Administration shall make a complete and total distribution of all earnings on investments and remaining gas tax collected during the fiscal year, taking into account all the requirements of s. 16, Art. IX of the State Constitution of 1885, as amended, of bonds pledging all or any portion of the *constitutional* [second] gas tax accruing thereunder, and s. 9(c), Art. XII of the revised State Constitution of 1968, as amended.

Section 18. Sections 206.50, 206.51, 206.52, 106.53, 206.54, 206.55, 206.57, and 206.58, Florida Statutes, are hereby repealed.

Section 19. The Statutory Revision Division is directed to change the catchline of s. 206.60, Florida Statutes, to "County tax on motor fuel" and the catchline of s. 206.605, Florida Satutes, to "Municipal tax on motor fuel," and is further directed to entitle part I of chapter 212, Florida Statutes, as "Tax for Privilege of Tangible Personal Property Sales or Use, Admissions and Rentals," and part II of Chapter 212, Florida Statutes as "Tax for Privilege of Motor and Special Fuel Sales."

Section 20. Sections 3 and 4 of chapter 80-77, Laws of Florida, appearing as sections 206.602 and 206.603, Florida Statutes, and sections 206.65, 206.66, 206.67, 206.68, 206.69, 206.70, 206.71, 206.72, 206.73, 206.74, 206.75, and 206.76 Florida Statutes, are hereby repealed.

Section 21. Section 206.625, Florida Statutes, is amended to read:

206.625 Return of tax to municipalities, *counties, and school districts.*—

(1) Those portions of the *county* [first gas tax imposed by s. 206.41, and the additional] gas tax, imposed by s. 206.60, which result from the collection of such *tax* [taxes] paid by a municipality *or county* on *motor fuel* [gasoline] for use in a motor vehicle operated by it shall be returned to the governing body of each such municipality *or county according to the administrative procedures in s. 212.92* for the construction, reconstruction, and maintenance of roads and streets within the *respective* municipality or *county.*

(2) *Those portions of the county gas tax imposed by s. 206.60*

which result from the collection of such tax paid by a school district, or by a private contractor operating school buses for a school district, on motor fuel for use in a motor vehicle operated by such district or private contractor shall be returned to the governing body of each such school district according to the administrative procedures in §212.92 to be used to fund construction, reconstruction, and maintenance of roads and streets within the school district required as a result of new school construction or renovation of existing schools. The school board shall select the projects to be funded; however, first priority shall be given to projects required as the result of new school construction, unless a waiver is granted by the effected county or municipal government. [The department shall promulgate such rules and regulations and shall prescribe such forms as shall be necessary to affectuate the purposes of this section.]

Section 22. Section 206.64, Florida Statutes, is amended to read:

206.64 Refunds on fuel used for agricultural or commercial fishing purposes. [limitations, claims.]—Any person who uses any motor fuel for agricultural purposes or commercial fishing purposes on which the tax, as imposed by this part, has been paid shall be entitled to a refund of the *municipal tax imposed by s. 206.605 according to the administrative procedures in s. 212.92* [state tax except the 2-cents per gallon gas tax known as the second gas tax and the seventh cent gas tax as provided by s. 206.60. However, no refund shall be authorized unless sworn applications therefor containing such information as the department may determine are filed with it not later than January 31 immediately following the year for which refund is claimed. When claim is filed after January 31 and there is presented to the department a justified excuse for late filing and the last preceding claim has been filed on time, such late filing may be accepted through February of the year filed. No refund shall be authorized for purchases of less than 26 gallons at any one time; and no refund shall be authorized unless the amount due is for $5 or more in any 12-month period.]

Section 23. Subsection (1) of section 206.70, Florida Statute, is amended to read:

206.70 When refund claims allowed; procedure, right of refund nonassignable, exceptions; fee.—

(1) When the department is satisfied that a refund is proper, it shall authorize the amount of the *municipal tax imposed by s. 206.605* [state gas tax paid except the 2 cents per gallon tax known as the

"second gas tax" and the seventh cent gas tax as provided by s. 206.60], to be refunded as other refunds are made; and the amount shall be refunded and deducted by it from current gas tax receipts in its possession. Such refunds shall be allowed only on motor fuel purchased in quantities of 26 gallons or more and used in machines, boats, and equipment listed by the claimant in his application for refund.

Section 24. Subsection (3) of section 206.87, Florida Statutes, is hereby repealed, and subsection (1) of said section is amended to read:

206.87 Levy of tax.—

(1) An excise tax of *4 [2]* cents per gallon is hereby imposed upon every gallon of special fuel used or sold in this state for use. Unless expressly provided to the contrary in this part, every sale shall be deemed to be for use in this state. This levy of tax [is upon the consumer but] shall be paid upon the first sale or transfer of title within this state by a dealer, except as expressly provided in this part, who shall act as agent for the state in the collection of said tax whether he be the ultimate seller or not.

Section 25. Subsection (2) of section 206.875, Florida Statutes, is amended to read:

206.875 Allocation of tax.—

(2) It is the intent of the Legislature that this section be construed to provide for the distribution of the appropriate portion of the special fuels tax imposed by this part, in the same manner as provided by ss. [206.29, 206.30, 206.31, 206.32, 206.33, 206.34, 206.35, 206.36, 206.37, 206.38, 206.39, 206.40,] 206.41, 206.45, 206.60, 206.605 and 206.625.

Section 26. Subsection (1) of section 206.90, Florida Statutes, is amended to read:

206.90 Bond required of licensed dealers.—

(1) Every dealer, except a municipality, county, school board or special district which is licensed as a dealer under this part, shall file with the department a bond or bonds in the penal sum of *not less than $10,000 or [not] more than $100,000 [$35,000]*. The sum of said bond shall be approximately 3 times the average monthly special fuels tax paid or due by such dealer during the preceding 12 calendar months under this part, with a surety approved by the department, upon which the dealer shall be the principal obligator and the state shall be the obligee, conditioned upon the faithful compliance with the provisions of this part. If the sum of 3 times a dealer's average monthly tax is less than $50, no bond shall be required.

Section 27. Subsection (1) of section 206.91, Florida Statutes, is amended to read:

206.91 Tax reports; computation and payment of tax.—

(1) For the purpose of determining the amount of tax imposed by s. 206.87, each dealer shall, not later than the 20th day of each calendar month, mail to the department, on forms prescribed by the department, monthly reports which shall show inventories, purchases, nontaxable disposals, and taxable sales in gallons of each type of special fuel, including, but not limited to, diesel and heating fuel, kerosene, butane gas, propane gas, and all other forms of liquified petroleum gases, for the preceding calendar month. However, if the 20th day falls on a Saturday, a Sunday, or a federal or state legal holiday, returns shall be accepted if postmarked on the next succeeding workday. The reports shall contain or be verified by a written declaration that such report is made under the penalties of perjury. The dealer shall deduct from the amount of tax shown by the report to be payable an amount equivalent to *4* [2] percent of the tax on special fuels imposed by this part not exceeding 500,000 taxable gallons, and less an amount equivalent to *2* [1] percent of the tax on special fuels *imposed by this part* in excess of 500,000 taxable gallons but not exceeding 800,000 taxable gallons which is hereby allowed to the dealer on account of services and expenses in complying with the provisions of this part. This allowance shall not be deductible unless payment of tax is made on or before the 20th day of the month as herein required.

Section 28. Section 206.97, Florida Statutes, is amended to read:

206.97 Applicability of specified sections of part I.—The provisions of ss. 206.04, 206.055, 206.07, 206.075, 206.08, 206.09, 206.10, 206.11, 206.12, 206.13, 206.14, 206.15, 206.16, 206.17, 206.175, 206.18, 206.19, 206.20, 206.204, 206.205, 206.21, 206.215, 206.22, 206.23, 206.24, 206.25, [206.26,] 206.28, 206.41*(3)*[(5)], 206.49, 206.56, [206.57, 206.58,] 206.59, 206.61, 206.62 of part I of this chapter, shall, as far as lawful or practicable, be applicable to the tax herein levied and imposed and to the collection thereof as if fully set out in this part II. However:

(1) "Distributor" means "dealer."

(2) "Motor fuel" means "special fuel."

(3) No provision of any such section shall apply if it conflicts with any provision of part II of this chapter.

Section 29. Section 207.003, Florida Statutes, is amended to read:

207.003 Privilege tax levied.—A tax for the privilege of operating any commercial motor vehicle upon the public highways of this state shall be levied upon every motor carrier *at a rate which includes* the rate provided in chapter 206, and [including the sales tax which may be] imposed *by part II* of [in the future by the repeal of the current exemption in] chapter 212, on each gallon of special fuel or motor fuel used for the propulsion of a commercial motor vehicle by such motor carrier within the state.

Section 30. Subsections (2) and (3) of section 207.005, Florida Statutes, are amended to read:

207.005 Returns and payment of tax; delinquencies; calculation of fuel used during operations in the state; credit; bond.—

(2) The amount of fuel used in the propulsion of any commercial motor vehicle within this state may be calculated, if the motor carrier maintains adequate records, by applying total interstate vehicular consumption of all special fuel and motor fuel used as related to total miles traveled and applying such rate to total miles traveled within this state. [If the motor carrier maintains records which show the actual amount paid for all special fuel and motor fuel used in this state, regardless of where the fuel was purchased, that amount shall be multiplied by the tax rate levied on motor fuels under chapter 212.] In the absence of adequate documentation by the motor carrier, the department is authorized to promulgate rules converting miles driven to gallons used and [to establish a retail price per gallon reported or computed to be due].

(3) For the purpose of computing the carrier's liability for the road privilege tax, the total gallons of fuel used in the propulsion of any commercial motor vehicle in this state shall be multiplied by the *rates* [rate] provided in chapter 206 *and part II of chapter 212*. From the sum determined by this calculation, there shall be allowed a credit equal to the amount of the tax per gallon *under chapter 206 and part II of chapter 212* for each gallon of fuel purchased in this state during the reporting period when the special fuel or motor fuel tax was paid at the time of purchase. If the tax paid under chapter 206 exceeds the total tax due under this chapter, the excess may be allowed as a credit against the tax due during the succeeding 12-month reporting period. Under no circumstances shall a refund be made for this credit.

Section 31. Section 207.026, Florida Statutes, is amended to read:

207.026 Allocation of tax.—All moneys derived from the taxes and fees imposed by this chapter shall be paid into the State Treasury by the department for deposit in the Special Fuel and Motor Fuel Use Tax Clearing Trust Fund, from which the following transfers shall be made: After withholding $50,000 from the proceeds therefrom, to be used as a revolving cash balance, the funds for the purpose of conducting the study as set forth in s. 4 of chapter 80-415, Laws of Florida, and the amount of funds necessary for the administration and enforcement of this tax, all other moneys shall be transferred in the same manner and for the same purpose as provided in s. 206.41, s. 206.45, s. 206.60, and s. 206.605, *and s. 212.95.*

Section 32. Section 213.11, Florida Statutes, is hereby repealed.

Section 33. Subsections (1), (2), and (17) of section 215.22, Florida Statutes, are amended, and subsection (21) is added to said section, to read:

215.22 Certain moneys and certain trust funds enumerated.—The following described moneys and trust funds, by whatever name designated, shall be those from which the deductions authorized by s. 215.20 shall be made:

(1) *The moneys deposited in the Gas Tax Collection Trust Fund* [first gas tax levied] pursuant to the provisions of s. *212.95* [206.41].

(2) The *county* [seventh-cent additional] tax upon gasoline or other like products of petroleum levied pursuant to the provisions of s. 206.60.

(17) All income derived from outdoor advertising and overweight violations which is deposited in the State Transportation Trust Fund created in s. *206.46* [206.45].

(21) All taxes deposited in the Local Option Gas Tax Trust Fund created pursuant to s. 336.025.

The enumeration of the above moneys or trust funds shall not prohibit the applicability thereto of s. 215.24 should the Governor determine that for the reasons mentioned in s. 215.24 said money or trust fund should be exempt herefrom, as it is the purpose of this law to exempt all trust funds from its force and effect where, by the operation of this law, federal matching funds or contributions to any trust fund would be lost to the state.

Section 34. Section 215.36, Florida Statutes, is amended to read:

215.36 State funds; laws not repealed.—Nothing in ss. 215.31-215.32, 215.34-215.36 shall be construed as repealing ss. 215.20, 215.22 to 215.25, inclusive, or as affecting the proceeds of 2 cents per gallon of the total tax levied by state law upon gasoline and other like products of petroleum now known as the *constitutional* [second] gas tax, and upon other fuels used to propel motor vehicles, placed in the State Treasury and divided and distributed as required by s. 16 of Art. IX of the Constitution of 1885 as adopted by the 1968 revised constitution or by s. 9, Art. XII of said revision.

Section 35. Paragraph (d) of subsection (1) of section 215.47, Florida Statutes, 1982 Supplement is amended to read:

215.47 Investments; authorized securities—Subject to the limitations and conditions of the State Constitution or of the trust agreement relating to a trust fund, moneys available for investments under ss. 215.44-215.53 may be invested as follows:

(1) Without limitation in:

(d) Bonds issued or administered by the State Board of Administration secured solely by a pledge of all or part of the 2-cent *constitutional* [second] gas tax accruing under the provisions of s. 16, Art. IX of the State Constitution of 1885, as amended, or of s. 9, Art XII of the 1968 revised State Constitution.

Section 36. Section 215.74, Florida Statutes, is amended to read:

215.74 Pledge of *constitutional* [second] gas tax; consent by counties and state agency supervising state road system.—Any portion of the *constitutional* [second] gas tax provided for and allocated to the account of each of the several counties by s. 9(c), Art. XII of the State Constitution may be pledged and used for the payment of bonds issued by the division; provided, however, that such funds shall only be pledged and used with the consent of the state agency supervising the state road system and the governing body of the county to the account of which such portion of the *constitutional* [second] gas tax is allocated.

Section 37. Subsection (3) of section 336.41, Florida Statutes, is amended to read:

336.41 Counties, employing labor and providing road equipment; definitions.—

(3) All construction and reconstruction of roads and bridges, including resurfacing, full scale mineral seal coating, and major bridge

and bridge system repairs, to be performed utilizing the proceeds of the 80 percent portion of the surplus of the *constitutional* [second] gas tax shall be let to contract to the lowest responsible bider by competitive bid, except for:

(a) Construction and maintenance in emergency situations; and

(b) In addition to emergency work, construction and reconstruction, including resurfacing, mineral seal coating, and bridge repairs, having a total cumulative annual value not to exceed 5 percent of its 80 percent portion of the *constitutional* [second] gas tax or $50,000, whichever is greater, for which the county may utilize its own forces. However, if, after proper advertising, no bids are received by a county for a specific project, the county may use its own forces to construct the project, notwithstanding the limitation of this subsection. Nothing in this section shall prevent the county from performing routine maintenance as authorized by law.

Section 38. Section 339.08, Florida Statutes, 1982 Supplement, is amended to read:

339.08 Use of gas tax revenue by department.—

(1) The department shall by regulation provide for the expenditure of the *moneys in the State Transportation Trust Fund* [proceeds of the first gas tax] accruing to the Division of Road Operations, in accordance with its annual budget.

(2) Such regulations shall provide that the use of *said moneys* [the first gas tax] be restricted to the following purposes:

(a) To pay administrative expenses of the department, including administrative expenses incurred by the several state road districts.

(b) To pay the cost of the construction of the State Highway System and State Park Road System, including amounts necessary to match federal aid funds for such purposes. The department shall also match federal aid highway funds allocated to the county road and city street systems.

(c) To pay the cost of maintaining the State Highway System and State Park Road System.

(d) To make such other lawful expenditures of the department for the department for the payment of which no other funds may be specified, including the payment of compensation to employees of the Division of Road Operations except those employees whose jobs are designated as "J" in the official Florida merit system pay plan for overtime work in excess of 40 hours per week or other accepted standard work week, in cash or by way of compensatory time as may

be prescribed by regulation of the department. Any other laws in conflict herewith are hereby repealed.

(e) To pay the cost of maintaining state roads which were classified or maintained as primary roads on January 1, 1956, and not included by the road board in the state primary highway system when said system was reclassified by the road board in June 1956, pursuant to the provisions of this code.

(3)(a) The department may use available funds for the preparation of preliminary engineering plans with valid cost estimates, which plans and estimates shall be completed prior to the issuance of any bonds on all revenue-producing transportation projects. However, the department shall be reimbursed for the costs incurred for such preparation from the proceeds of the bond issue.

(b) The department shall not use or pledge the *moneys in the State Transportation Trust Fund* [proceeds of the first gas tax] on any revenue-producing transportation project without legislative approval. This limitation on pledging *said moneys* [the proceeds of the first gas tax] shall in no way impair the ability of the department or the counties to enter into covenants to complete transportation projects from all other legally available funds.

(c) No state bonds shall be sold for any revenue-producing transportation project if the proceedings authorizing such bonds include a covenant to complete by the department from the *moneys in the State Transportation Trust Fund* [proceeds of the first gas tax] until the department shall have made cost estimates based on the most current information available after approval of the final environment impact statement for such project and shall have determined based on such estimates that the projected available funds for any such project, excluding the use of *said moneys* [any proceeds from the first gas tax] pursuant to a covenant to complete, are sufficient to pay for such project. No additions shall be made to any revenue-producing project for which a covenant to complete from *said moneys* [the first gas tax] has been made which would expand the scope of such project unless such additions are specifically approved by the Legislature. For the purposes of this subsection, "project scope" shall mean the terminal points, the number of interchanges, and grade separations as approved by the Legislature. No contingency funds in the construction trust fund for any revenue-producing project for which a covenant to complete from *said moneys* [the first gas tax] has been

made shall be expended for any purpose other than such project until the completion of such project; however, such funds may be expended for other purposes if permitted by the proceedings authorizing such bonds and if the department certifies to the Executive Office of the Governor that such contingency funds are not required for the completion of the project and are available and sufficient for such other purposes and the Executive Office of the Governor approves such certification in writing to the department.

(d) In any lease-purchase agreement, which includes a covenant to complete by the department from the *moneys in the State Transportation Trust Fund* [proceeds of the first gas tax,] the department shall provide for the expeditious repayment of any and all costs incurred by the department as a result of the covenant to complete the transportation project. Such agreement shall provide for such repayment from excess tolls or *constitutional* [second] gas tax proceeds not required for payment of principal, interest, reserves, and other required deposits for the bonds and for the annual reimbursement from tolls or other local moneys or both, to the extent legally available, of all operating and maintenance costs of the facilities, as provided by the applicable provisions of the State Constitution and the bond proceedings.

(e) The provisions of subsections (c) and (d) shall not apply to any revenue-producing project approved by the Legislature prior to July 1, 1978.

(4)(a) Beginning July 1, 1977, the department shall develop and implement a phased transfer of the administrative responsibility for construction programs financed by the 80-percent portion of the *constitutional* [second] gas tax to the respective counties. In counties of over 100,000 population, this transfer of responsibility shall be made at the rate of not less than 20 percent per year and shall be completed by July 1, 1980. In counties having less than 100,000 population, there shall be an orderly transfer of responsibility, but in no case shall the transfer extend beyond July 1, 1980.

(b) All projects let to construction contract on or before June 30, 1977, shall be completed by the department. If requested by a county, the department may undertake or complete all stages of a project if it can be completed through the construction stage by July 1, 1980. Adequate arrangements shall be agreed to between the counties and the department to ensure that the department has sufficient funds to complete its projects as previously indicated.

(c) The Department of Transportation shall, until July 1, 1980, lend its assistance, advice, and counsel to the counties, when requested, in order to assist in the development of a program for the management of the county road program. This assistance may include such areas as consultant procurement, right-of-way acquisition, specifications, and construction inspection. After July 1, 1980, a county may enter into an agreement with the department to provide for the department to acquire rights-of-way for the county, provided the highway project is to be funded by the 80-percent portion of the *constitutional* [second] gas tax allocated to that county and requires the acquisition of at least 10 parcels of land, the total cost of which will equal or exceed $100,000.

(5) The department is required to maintain on deposit with the State Board of Administration all proceeds of the 80-percent surplus of the *constitutional* [second] gas tax. The department shall by regulation provide for the transfer of the proceeds of the 80-percent surplus of the *constitutional* [second] gas tax in each county's account necessary to meet the current expenditures of the several counties. No county shall submit a voucher for transfer of funds unless such funds are to reimburse a prior expenditure or to maintain sufficient funds to meet anticipated expenditures for the next 60 days. Such transfers shall be proceessed by the department within 3 working days of receipt of the county's voucher. Such regulations shall not provide for department approval or control over county expenditures, but are to provide for routine processing of transfer vouchers from the State Board of Administration to the counties and for the investment of said *constitutional* [second] gas tax funds so as to maximize investment earnings to the counties. The department shall not charge any fees or allocate department overhead to the counties for these services.

(6) The department is authorized to advance *constitutional* [second] gas tax trust funds to the Working Capital Trust Fund in an amount not to exceed $22,500,000. However, nothing herein contained shall in any way impair the present county road and bridge district bonds, revenue certificates, or other valid obligations of the respective counties. The department shall replace the *constitutional* [second] gas tax funds in the Working Capital Trust Fund by July 1, 1983. Effective July 1, 1983, the State Board of Administration shall assume the responsibilities for distribution of the counties' 80-percent share of the *constitutional* [second] gas tax in the same manner as the

20-percent share is currently distributed pursuant to s. 206.47; however, the State Board of Administration shall assure that county funds are made available to the Department of Transportation to be held in escrow for any construction underway on behalf of the county pursuant to resolution of the county governing body.

Section 39. Paragraph (a) of subsection (1) of section 339.081, Florida Statutes, is amended to read:

339.081 State Transportation Trust Fund; accounts.—

(1) The State Comptroller shall maintain within the State Transportation Trust Fund the following accounts:

(a) The restricted state roads moneys account to which shall be credited the proceeds of the gas *tax* [taxes] referred to in s. 339.08 [(3) and] (4). No moneys shall be paid out or transferred from this account except pursuant to a duly adopted resolution of the appropriate board of county commissioners which resolution shall be filed with the Comptroller; provided, however, nothing herein shall prohibit transfers made pursuant to s. 215.18.

Section 40. Subsection (2) of section 339.083, Florida Statutes, is amended to read:

339.083 County transportation trust fund, controls and administrative remedies.—

(2) The Auditor General shall conduct an audit of each such special trust fund at such intervals of time as practicable and in accordance with s. 11.45, to assure that the surplus of the *constitutional* [second] gas tax distributed to each county is being expended in accordance with law. If, as a result of an audit, the Auditor General determines that a county has violated the constitutional or statutory requirements for expenditure of transportation funds, he shall immediately notify the county. The county shall have an opportunity to respond to the auditor's report within 30 days after the date of written notification to the county. If the Auditor General refuses to modify or repeal his findings, the county may have such findings reviewed pursuant to the provisions of the Administrative Procedure Act, chapter 120. If the findings of the Auditor General are upheld after exhaustion of all administrative and legal remedies of the county, no further surplus *constitutional* [second] gas tax funds in excess of funds for committed projects shall be distributed to the violating county until the county corrects the matters cited by the Auditor General and such corrections have been certified by the Auditor General as having been completed.

Section 41. Subsection (1) of section 339.089, Florida Statutes, is amended to read:

339.089 Use by counties of the surplus from the *constitutional* [second] gas tax.—

(1) Any county which has agreed prior to July 1, 1977, by resolution, to use the surplus of the *constitutional* [second] gas tax to provide a connecting road to a planned interchange on the interstate system shall provide such connecting road.

Section 42. Subsection (2) of section 339.10, Florida Statutes, is amended to read:

339.10 Confirming advances of first gas tax funds to counties; authorizing advances *of proceeds of part II, chapter 212 tax* in the future.—

(2) The department, whenever it deems it advisable and in the best interest of the state because of the financial inability of a county to provide the necessary funds or in order to anticipate future surplus gasoline tax funds accruing to the county, may make advances of *the proceeds of the tax imposed under part II of chapter 212* [first gas tax funds] to a county for the acquistion of rights-of-way for roads of the state primary highway system therein or for the construction of road projects of the state primary highway system therein to be repaid out of any future accruals to the county of gasoline tax funds to be expended therein by the county or by the department.

Section 43. Subsection (3) of section 339.24, Florida Statutes, is amended to read:

339.24 Beautification of roads by department, counties, and cities; wayside parks; rules and regulations; enforcement; penalty.—

(3) The department is authorized to expend *proceeds of the tax imposed under part II of chapter 212* [first gas tax funds] to acquire, by donation or purchase, and to lay out, develop, improve, operate, and maintain, appropriate roadside or wayside parks, rest areas, boat ramps, and similar facilities under its jurisdiction at sites selected by the department.

Section 44. Section 344.17, Florida Statutes, is amended to read:

344.17 Depositories and investments.—All moneys received by the treasurer of the State Board of Administration, a body corporate under s. 9, Art XII of the State Constitution, shall be deposited by him in a solvent bank or banks, to be approved and accepted for such purposes by the said Board. In making such deposits he shall follow the method for the deposit of state funds. Each bank receiving any

portion of the said funds shall be required to deposit with the treasurer of said board satisfactory bonds or treasury certificates of the United States, bonds of the several states, special tax school district bonds, bonds of any municipality eligible to secure state deposits as provided by law, bonds of any county or special road and bridge district of this state entitled to participate under the provisions of s. 16, Art. IX of the Constitution of 1885, as adopted by the 1968 revised constitution, and of s. 9, Art. XII of said revision, bonds issued under the provisions of s. 18, Art. XII, of the Constitution of 1885 as adopted by s. 9, Art. XII of the 1968 revised constitution, or bonds, notes or certificates issued by the Florida State Improvement Commission or its successors, the Florida Development Commission and the Division of Bond Finance of the Department of General Services, which contain a pledge of the 80-percent surplus 2-cent *constitutional* [second] gasoline tax accruing under s. 16, Art. IX of the Constitution of 1885, as adopted by the 1968 revised constitution, and under s. 9, Art XII of said revision, which shall be equal to the amount deposited with said bank. Such security shall be in the possession of the treasurer of said board or the treasurer of said board is hereby authorized to accept in lieu of the actual depositing with him of such security, trust or safekeeping receipts issued by any Federal Reserve Bank, or member bank thereof, or by any bank incorporated under the laws of the United States; provided, however, that the member bank or bank incorporated under the laws of the United States shall have been previously approved and accepted for such purposes by the State Board of Administration, and provided, further, that said trust or safekeeping receipt shall be in substantially the same form as that which the State Treasurer is authorized to accept in lieu of securities given to cover deposits of state funds.

Section 45. Subsections (10) and (11) of section 348.217, Florida Statutes, are amended to read:

348.217 Definitions.—As used in part I of this chapter unless the context clearly indicates otherwise:

(10) "*Constitutional* [Second] gas tax" means and includes the 20-percent and 80-percent surplus gasoline tax funds accruing in each year to the Department of Transportation for use in Brevard County under the provisions of s. 9(c)(2), Art. XII of the State Constitution, after deduction only of any amounts of said gasoline tax funds heretofore pledged by the Department of Transportation or the county for outstanding obligations, or all other such funds as may otherwise be provided by the constitution for use in Brevard County.

(11) "*County*" [Seventh cent] gas tax" means all the gasoline tax funds accruing in each year for use in Brevard County under the provisions of s. 206.60.

Section 46. Paragraphs (g) and (k) of subsection (3) of section 348.219, Florida Statutes, are amended to read:

348.219 Purposes and powers.—

(3) The authority is hereby granted, and shall have and may exercise all powers necessary, appurtenant, convenient, or incidental to the carrying out of the aforesaid purposes, including, but without being limited to, the following rights and powers:

(g) To borrow money and make and issue negotiable notes, bonds, refunding bonds, and other evidences of indebtedness or obligations, either in temporary or definitive form, hereinafter in this part sometimes called "bonds," of the authority for the purpose of financing all or part of the improvement, extension, or construction of the Brevard County Expressway System and appurtenant facilities, including all approaches, streets, roads, bridges, and avenues of access for said Brevard County Expressway System and for any other purpose authorized by this part, said bonds to mature in not exceeding 40 years from the date of issuance thereof, and to secure the payment of such bonds or any part thereof by a pledge of any or all of its revenues, rates, fees, rentals, or other charges, including all or any portion of the *constitutional* [second] gas tax or the *county* [seventh cent] gas tax, or both, and in general to provide for the security of said bonds and the rights and remedies of the holders thereof. The pledge of said *constitutional* [second] gas tax or said *county* [seventh cent] gas tax, or both, and the amount and conditions of such pledge shall be first approved by the Board of County Commissioners of Brevard County. However, no portion of said *constitutional* [second] gas tax or said *county* [seventh cent] gas tax, or both, shall be pledged for the construction of any project for which a toll is to be charged unless the anticipated tolls are reasonably estimated the board of county commissioners, at the date of its resolution pledging said funds, to be sufficient to cover the principal and interest of such obligations during the period when said pledge of funds shall be in effect.

1. The authority shall reimburse Brevard County for any sums expended from said gasoline tax funds used for the payment of such obligations. Any gasoline tax funds so disbursed shall be repaid when the authority deems it practicable, together with interest at the highest rate applicable to any obligations of the authority.

2. In the event the authority determines to fund or refund any bonds theretofore issued by said authority or by said commission as aforesaid prior to the maturity thereof, the proceeds of such funding or refunding bonds shall, pending the prior redemption of the bonds to be funded or refunded, be invested in direct obligations of the United States, and it is the express intention of this part that such outstanding bonds may be funded or refunded by the issuance of bonds pursuant to this part, notwithstanding that part of such outstanding bonds will not mature or become redeemable until 10 years after the date of issuance of bonds pursuant to this part to fund or refund such outstanding bonds.

(k) To pledge, hypothecate, or otherwise encumber all or any part of the revenues, rates, fees, rentals, or other charges or receipts of the authority, including all or any portion of the *constitutional* [second] gas tax or the *county* [seventh cent] gas tax, or both, subject to the prior approval of the Board of County Commissioners of Brevard County as provided herein, as security for all or any of the obligations of the authority.

Section 47. Subsections (1) and (4) and paragraph (a) of subsection (3) of section 348.22, Florida Statutes, are amended to read:

348.22 Bonds of the authority.—

(1) The bonds of the authority issued pursuant to the provisions of this part, whether on original issuance or on refunding, shall be authorized by resolution of the members thereof, may be either term or serial bonds, and shall bear such date or dates, mature at such time or times, not exceeding 40 years from their respective dates, bear interest at such rate or rates, not exceeding 8 percent per annum, payable semiannually, be in such demonations, be in such form, either coupon or fully registered, carry such registration or exchangeability privileges, be payable in such medium of payment and at such place or places, be subject to such terms of redemption and be entitled to such priorities on the revenues, rates, fees, rentals or other charges or receipts of the authority, including the *constitutional* [second] gas tax

or the *county* [seventh cent] gas tax, or both, subject to the prior approval of the Board of County Commissioners of Brevard County, as provided herein. The bonds shall be executed either by manual or facsimile signature by such officers as the authority shall determine, provided such bonds bear at least one signature which is manually executed thereon, and the coupons attached to such bonds shall bear the facsimile signature or signatures of such officer or officers as shall be designated by the authority and shall have the seal of the authority affixed, imprinted, reproduced or lithographed thereon, all as may be prescribed in such resolution or resolutions.

(3) Any such resolution or resolutions authorizing any bonds hereunder may contain provisions which shall be part of the contract with the holders of such bonds, as to:

(a) The pledging of all or any part of the revenues, rates, fees, rentals, including all or any portion of the *constitutional* [second] gas tax or the *county* [seventh cent] gas tax, or both, subject to the prior approval of the Board of County Commissioners of Brevard County, as provided herein, or other charges or receipts of the authority derived from the system.

(4) The authority may employ fiscal agents as provided by this part or the State Board of Administration may, upon request of the authority, act as fiscal agent for the authority in the issuance of any bonds which may be issued pursuant to this part, and the State Board of Administration may, upon request of the authority, take over the management, control, administration, custody, and payment of any or all debt services of funds or assets now or hereafter available for any bonds issued pursuant to this part. The authority may enter into any deeds of trust, indentures, or other agreements within or without the state, as security for such bonds, and may, under such agreements, sign and pledge all or any of the revenues, rates, fees, rentals or other charges, or receipts of the authority, including the *constitutional* [second] gas tax or the *county* [seventh cent] gas tax, or both, subject to the prior approval of the Board of County Commissioners of Brevard County, as provided herein. Such deed of trust, indenture, or other agreement may contain such provisions as are customary in such instruments or as the authority may authorize, including, but without limitation, provisions as to:

(a) The completion, improvement, operation, extension, maintenance, repair, and lease of, or lease-purchase agreement relating to, the Brevard County Expressway System and the duties of

the authority and others, including the Department of Transportation, with reference thereto.

(b) The application of funds and the safeguarding of funds on hand or on deposit.

(c) The rights and remedies of the trustee and the holders of the bonds.

(d) The terms and provisions of the bonds or the resolutions authorizing the issuance of same.

Section 48. Paragraph (b) of subsection (2) of section 348.221, Florida Statutes, is amended to read:

348.221 Remedies of the bondholders.—

(2) Such trustee, and any trustee under any deed of trust, indenture, or other agreement, may, and upon written request of the holders of 25 percent, or such other percentage as may be specified in any deed of trust, indenture, or other agreement aforesaid, in principal amount of the bonds then outstanding, shall, in any court of competent jurisdication, in his or its own name:

(b) By mandamus or other suit, action, or proceeding at law or in equity, enforce all rights of the bondholders under or pursuant to any lease-purchase agreement between the authority and the Department of Transportation, including the right to require the Department of Transportation to make all rental payments required to be made by it under the provisions of any such lease-purchase agreement, whether from the Brevard County *constitutional* [second] gas tax or *county* [seventh cent] gas tax, or both, or other funds of the department so agreed to be paid and to require the Department of Transportation to carry out any other covenants and agreements with, or for the benefit of, the bondholders and to perform its and their duties under this part.

Section 49. Subsections (4) and (5) of section 348.222, Florida Statutes, are amended to read:

348.222 Lease-purchase agreement.—

(4) The Department of Transportation, as lessee under such lease-purchase agreement, is hereby authorized to pay, as rentals thereunder, any rates, fees, charges, funds, moneys, receipts, or income accruing to the Department of Transportation from the operation of the Brevard County Expressway System and the *constitutional* [second] gas tax or the *county* [seventh cent] gas tax, or both, and may also pay, as rentals, any appropriations received by the Department of Transportation pursuant to any act of the Legislature

heretofore or hereafter enacted. However, nothing herein or in such lease-purchase agreement is intended to, nor shall this part or such lease-purchase agreement, require the making or continuance of such appropriations, nor shall any holder of bonds issued pursuant to this part ever have any right to compel the making or continuance of such appropriations.

(5) No pledge of said *constitutional* [second] gas tax or said *county* [seventh cent] gas tax, or both, as rentals under such lease-purchase agreement shall be made without the consent of Brevard County, evidenced by a resolution duly adopted by the board of county commissioners of said county at a public hearing held pursuant to due notice thereof published at least once a week for 3 consecutive weeks before the hearing in a newspaper of general circulation in the county. Said resolution, among other things, shall provide that any excess of said pledged *constitutional* [second] gas tax or *county* [seventh cent] gas tax, or both, which are not required for debt service or reserves for such debt service for any bonds issued by said authority shall be distributed annually to Brevard County as provided by law. The Department of Transportation shall have power to convenant in any lease-purchase agreement that it will pay all or any part of the cost of the operation, maintenance, repair, renewal, and replacement of said system, and any part of the cost of completing said system, to the extent that the proceeds of bonds issued therefor are insufficient, from sources other than the revenues derived from the operation of said system and said *constitutional* [second] gas tax or said *county* [seventh cent] gas tax, or both. The Department of Transportation may also agree to make such other payments from any moneys available to Brevard County, in connection with the construction or completion of said system, as shall be deemed by the Department of Transportation to be fair and proper under any such convenants heretofore or hereafter entered into.

Section 50, Subsection (10) of section 348.81, Florida Statutes, is amended to read:

348.81 Definitions.—As used in part IV of this chapter, unless the context clearly indicates otherwise:

(10) "Pasco County gasoline tax funds" means all the 80-percent surplus gasoline tax funds accruing in each year to the Department of Transportation for use in Pasco county under the provisions of s. 9, Art. XII of the State Constitution or all such *constitutional*

[secondary] gas funds as may otherwise be provided now or hereafter by the constitution or by statute for use in Pasco County, after deduction only of any amounts of said gasoline tax funds heretofore pledged by the Department of Transportation or the county for outstanding obligations.

Section 51. Subsection (10) of section 348.951, Florida Statutes, is amended to read:

348.951 Definitions.—As used in this part, unless the context clearly indicates otherwise:

(10) "Seminole County gasoline tax funds" means all the 80-percent surplus gasoline tax funds accruing in each year to the Department of Transportation for use in Seminole County under the provisions of s. 9, Art. XII of the State Constitution, or all such *constitutional* [secondary] gas funds as may otherwise be provided now or hereafter by the constitution or by statute for use in Seminole County, after deduction only of any amounts of said gasoline tax funds heretofore pledged by the Department of Transportation or the county for outstanding obligations.

Section 52. Subsection (2), paragraphs (a) (b), and (c) of subsection (3) and paragraphs (c), (d), and (e) of subsection (4), of section 320.08, Florida Statutes, 1982 Supplement, are amended to read:

320.08 License taxes.—Except as otherwise provided herein, there are hereby levied and imposed annual license taxes for the operation of motor vehicles and mobile homes, as defined in s. 320.01, and mopeds, as defined in s. 316.003(2), which shall be paid to and collected by the department upon the registration or reregistration of the following:

(2) AUTOMOBILES FOR PRIVATE USE.—

(a) Antique automobiles: $7.50 flat. An "antique automobile" is defined as any passenger automobile manufactured more than 20 years prior to the current date and equipped with an engine manufactured more than 20 years prior to the current date or an engine manufactured to the specifications of the original engine.

(b) Net weight of less than 2,500 pounds: *$14.50* [$12.50] flat.

(c) Net weight of 2,500 pounds or more, but less than 3,500 pounds: *$22.50* [$20.50] flat.

(d) Net weight of 3,500 pounds or more: *$32.50* [$30.50] flat.

(3) TRUCKS.—

(a) Net weight of less than 2,000 pounds: *$14.50* [12.50] flat.

(b) Net weight of 2,000 pounds or more, but not more than 3,000 pounds: *$22.50* [$20.50] flat.

(c) Net weight more than 3,000 pounds, but not more than 5,000 pounds: *$32.50* [$30.50] flat.

(4) TRUCK-TRACTORS, FEES ACCORDING TO GROSS VEHICLE WEIGHT.—

(c) Gross weight of 44,000 pounds or more, but less than 53,000 pounds; *$572* [$360] flat.

(d) Gross weight of 53,000 pounds or more, but less than 62,000 pounds: *$678* [$420] flat.

(e) Gross weight of 62,000 pounds or more: *$979* [$460] flat.

However, a truck-tractor used exclusively for hauling forestry products shall, notwithstanding the GVW declared weights, be eligible for a license plate and for operation within a 150-mile radius of its home address upon payment of a fee of $240 flat.

Section 53. Section 320.20, Florida Statutes, is amended to read:

320.20 Disposition of license moneys.—The revenues derived from the licensing of motor vehicles, excluding those collected and distributed under the provisions of s. 320.081, shall be distributed monthly, as collected, to the following funds:

(1) The first proceeds, to the extent necessary to comply with the provisions of s. 18 of Art. XII of the State Constitution of 1885, as adopted by s. 9(d), Art. XII, 1968 revised constitution, and the additional provisions of s. 9(d) and s. 236.602, shall be deposited in the district Capital Outlay and Debt Service School Trust Fund.

(2) [(2)] *$25 million per year* [The remainder] of such revenues shall be deposited in the Advanced Construction Interstate Revolving Trust Fund to be expended solely for the completion of the interstate highway system pursuant to an agreement with the Federal Government providing for repayment of such funds on the appropriate matching basis.

(3) [(3)] *The remainder* [Thirty-six and five-tenths percent] of such revenues shall be deposited in the State Transportation Trust Fund.

Section 54. Subsections (1) and (2) of section 336.021, Florida Statutes, 1982 Supplement, are amended to read:

336.021 County transportation system; levy of *voted gas* tax on motor *fuel* [fuels] and special *fuel* [fuels].—

(1) Any county in the state, in the discretion of its governing body and subject to a referendum, may impose, in addition to all other taxes required *or allowed* by law, a 1-cent *voted gas* tax upon every gallon of motor fuel and special fuel sold in such county and taxed under the provisions of chapter 206, for the purpose of paying the costs and expenses of establishing, operating, and maintaining a transportation system and related facilities and the cost of acquisition, construction, reconstruction, and maintenance of roads and streets. The governing body of the county may provide that the referendum be worded to limit the number of years such tax will remain in effect. The governing body of the county may, by joint agreement with one or more of the municipalities located therein, provide for these transportation purposes and the distribution of the proceeds of this tax within both the unincorporated and incorporated areas of the county. The tax shall be collected in the same manner as all other gas taxes pursuant to chapter 206 and shall be returned monthly to the county where collected. The provisions for refund provided in ss. [206.29, 206.50,] 206.625 and 206.64 shall not be applicable to such tax levied by any county.

(2) The additional tax collected by the department pursuant to subsection (1) shall be transferred to a *Voted Gas* [Local Transportation] Tax Trust Fund, which fund is created for distribution to the county in which the tax was collected [as provided for in subsection (1)]. The department shall have the authority to prescribe and publish all forms upon which reports shall be made to it and other forms and records deemed to be necessary for proper administration and collection of the tax levied by any county and shall promulgate such rules as may be necessary for the enforcement of this section, which rules shall have the full force and effect of law. [Each distributor of motor fuel and dealer of special fuel shall, on or before the 20th day of the month, file a report and remit the tax collected to the department. If the 20th day of the month falls on a Saturday, Sunday, or a federal or state legal holiday, the report shall be accepted if postmarked by the United States Post Office on the next succeeding workday.] The sections of chapter 206, including, but not limited to, *timely filing of reports and tax collected,* suits for collection of unpaid taxes, department warrants for collection of unpaid taxes, penalties, interest, retention of records, inspection of records, liens on property,

foreclosure, and other sections relating to enforcement and collection shall also apply to the tax authorized in this section.

Section 55. Section 336.025, Florida Statutes, is created to read:

336.025 County transportation system; levy of local option gas tax on motor fuel and special fuel.—

(1)(a) In addition to other taxes allowed by law, there may be imposed as provided herein a 1, 2, 3, or 4 cent local option gas tax upon every gallon of motor fuel and special fuel sold in a county and taxed under the provisions of chapter 206.

(b) The tax shall be imposed effective September 1, of any year for a period not to exceed 5 years, and the applicable method of distribution shall be established pursuant to subsection (3) or (4). Upon expiration, the tax may be reimposed provided that a redetermination of the method of distribution shall be made as provided herein.

(c) County and municipal governments shall utilize moneys received pursuant to this section only for transportation expenditures.

(2) The tax shall be collected in the same manner as all other gas taxes pursuant to chapter 206 and shall be distributed monthly. The provisions for refund provided in ss. 206.625 and 206.64 shall not be applicable to such tax levied by any county. The tax collected by the Department of Revenue pursuant to this section, less the service charge provide in s. 215.20, shall be transferred to Local Option Gas Tax Trust Fund, which fund is created for distribution to county and eligible municipal governments within the county in which the tax was collected. The department shall have the authority to prescribe and publish all forms upon which reports shall be made to it and other forms and records deemed to be necessary for proper administration and collection of the tax and shall promulgate such rules as may be necessary for the enforcemnt of this section. The sections of chapter 206, including, but not limited to, timely filing of reports and tax collected, suits for collection of unpaid taxes, department warrants for collection of unpaid taxes, penalties, interest, rention of records, inspection of records, liens on property, foreclosure, and other sections relating to enforcement and collection shall also apply to the tax authorized in this section.

(3) The tax shall be imposed using either of the following procedures:

(a) The governing body of the county shall, by majority vote for the first 2 cents and a majority-plus-one vote for the second 2 cents, adopt an ordinance pursuant to this section in accordance with the requirements imposed under one of the following circumstances, whichever is applicable:

1. Prior to July 1 the county may establish by inter-local agreement with one or more of the municipalities located therein representing a majority of the incorporated area population within the county, a distribution formula for dividing the proceeds of the tax among the county government and all eligible municipalities within the county.

2. If an interlocal agreement has not been executed pursuant to paragraph (a) 1. prior to July 15, the county may adopt a resolution of intent to levy the tax allowed herein.

(b) If no ordinance is enacted pursuant to paragraphs (3)(a)1. or 2., prior to July 30, municipalities representing more than 50 percent of the county population may adopt uniform resolutions approving the local option tax, establishing the duration of the levy and the rate authorized in (1)(a), and setting the date for a countywide referendum on whether to impose the tax. A referendum shall be held in accordance with the provisions of said resolution and applicable state law, provided that the county shall bear the costs thereof. The tax shall be imposed and collected countywide on September 1 following thirty days after voter approval.

(4) If the tax is imposed under the circumstances of paragraphs (3)(a)2. or (3)(b), proceeds of the tax shall be distributed among the county government and eligible municipalities based on the transportation expenditures of each for the 5 fiscal years preceding the year in which the tax is authorized, as a proportion of the total of such expenditures for the county and all municipalities within the county.

(5)(a) Prior to imposition of the tax under this section, the county shall provide the Department of Revenue with distribution proportions established pursuant to subsection (4), if applicable, or by interlocal agreement.

(b) Disputes as to the county's determination of distribution proportions shall be resolved by administrative hearing pursuant to s. 120.57, with right of appeal to the Administration Commission. Pending final disposition of such proceedings, the governing body may collect the tax pursuant to this section, and such funds shall be

held in escrow by the clerk of the circuit court of the county until final disposition.

(6) Only those municipalities and counties eligible for participation in the distribution of moneys under parts II and VI of chapter 218 shall be eligible to receive moneys under this section. Any funds otherwise undistributed because of ineligibility shall be distributed to eligible governments within the county in proportion to other moneys distributed pursuant to this section.

(7) For the purposes of this section, "transportation expenditures" means expenditures by the local government from local or state shared revenue sources, excluding expenditures of bond proceeds, for the following programs:

(a) Public transportation operations and maintenance.

(b) Roadway and right-of-way maintenance and equipment.

(c) Roadway and right-of-way-drainage.

(d) Streetlighting.

(e) Traffic signs, traffic engineering, signalization, and pavement markings.

(f) Bridge maintenance and operation.

(g) Debt service and current expenditures for transportation capital projects in the above program areas, including construction or reconstruction of roads.

Section 56. Transition taxes.—

(1) There is hereby levied a tax at the rate of 1.7 cents per gallon on motor fuel or special fuel upon which the tax imposed pursuant to chapter 206, Florida Statutes, has been paid, which is held in inventory on April 1, 1983, and upon which the tax imposed pursuant to part II of chapter 212, Florida Statutes, has not be paid.

(2) There is hereby levied a tax at the rate of 5.7 cents per gallon on motor fuel or special fuel which is not subject to the tax imposed in chapter 206, Florida Statutes, which is held in inventory on April 1, 1983, which, if it had been sold on April 1, 1983, by a distributor or dealer licensed under chapter 206, Florida Statutes, would have been taxable under part II of chapter 212, Florida Statutes, and upon which the tax imposed in said part has not been paid. However, a credit shall be allowed against the tax imposed in this subsection equal to the amount of sales tax, if any, paid on such fuels under part I of chapter 212, Florida Statutes.

(3) "Motor fuel" and "special fuel" are defined as provided in s. 212.02(21) and (22), Florida Statutes.

(4) The tax levied by subsections (1) and (2) shall be due and payable on April 1, 1983, and shall be remitted to the Department of Revenue on or before April 20, 1983, on a form prescribed by the department.

(5) For any unpaid tax, late filing, or failure to file under this section, a penalty equal to 5 percent of the unpaid amount shall be imposed for every 30-day increment or fraction thereof until paid, not to exceed a total of 25 percent. In addition, interest at the rate of 1 percent per month shall be paid on any delinquent tax.

(6) The Department of Revenue shall promulgate rules and conduct audits necessary for the implementation of this section, and shall provide reasonable notice of the provisions of this section.

(7) Moneys collected pursuant to this section shall be distributed to the General Revenue Fund.

Section 57. There is hereby appropriated to the Department of Revenue for fiscal year 1982-1983 eight positions and $90,025 from the General Revenue Fund to implement the provisions of this act.

Section 58. Except to the extent that the Secretary of the Department of Transportation determines otherwise, not less than 10 percent of the amounts *expended from the State Transportation Trust Fund* shall be expended with small business concerns owned and controlled by the socially and economically disadvantaged individuals as defined by section B(d) of the Small Business Act (15 U.S.C. section 637(d) and relevant subcontracting regulations promulgated pursuant thereto.

Section 59. Subsection (9) of section 220.02, Florida Statutes, 1982 Supplement, is amended to read:

220.02 Legislative intent.—

(9) It is the intent of the Legislature that credits against either the corporate income tax or the franchise tax be applied in the following order: those enumerated in s. 220.68, those enumerated in s. 631.719(1), those enumerated in s. 220.18, those enumerated in s. 220.181, those enumerated in s. 220.183, those enumerated in s. 220.182, *those enumerated in s. 220.189*, and those enumerated in s. 221.02.

Section 60. Paragraph (a) of subsection (1) of section 220. 13, Florida Statutes, 1982 Supplement, is amended to read:

220.13 "Adjusted federal income" defined.—

(1) "Adjusted federal income" means an amount equal to the taxpayer's taxable income as defined in subsection (2), or such taxable income of more than one taxpayer as provided in s. 220.131, for the taxable year, adjusted as follows:

(a) Additions.—There shall be added to such taxable income:

1. The amount of income tax paid or accrued as a liability to this state under this code which is deductible from gross income in the computation of taxable income for the taxable year.

2. The amount of interest which is excluded from taxable income under s. 103(a) of the Internal Reveue Code or any other federal law, less the associated expenses disallowed in the computation of taxable income under s. 265(2) of the Internal Revenue Code or any other law.

3. In the case of a regulated investment company of real estate investment trust, an amount equal to the excess of the net long-term capital gain for the taxable year over the amount of the capital gain dividends attributable to the taxable year.

4. That portion of the wages or salaries paid or incurred for the taxable year which is equal to the amount of the credit allowable for the taxable year under s. 220.181. The provisions of this subparagraph shall expire and be void on June 30, 1986.

5. That portion of the ad valorem school taxes paid or incurred for the taxable year which is equal to the amount of the credit allowable for the taxable year under s. 220.182. The provisions of this subparagraph shall expire and be void on December 31, 1986.

6. The amount of emergency excise tax paid or accrued as a liability to this state under chapter 221 which tax is deductible from gross income in the computation of taxable income for the taxable year.

7. That portion of assessments to fund a guaranty association incurred for the taxable year which is equal to the amount of the credit allowable for the taxable year.

8. That portion of the taxes paid under the part II of chapter 212 which is equal to the amount of the credit allowable for the taxable year under s. 220.189.

Section 61. Section 220.189, Florida Statutes, is created to read:

220.189 Airline corporate tax credit.—

(1) There shall be allowed as a credit against the tax imposed by this part for the taxable year an amount which shall not exceed whichever of the following is the lesser:

(a) One-half of the tax imposed upon, and paid by, any qualified airline carrier pursuant to part II of chapter 212;

(b) Five million dollars.

(2) The credit granted in this section shall be allowed only to an air common carrier licensed as a common carrier by the Civil Aeronautics Board to transport persons or property in interstate or foreign commerce which maintains or establishes its corporate or business home office in this state and which maintains a work force within this state of more than 1,200 employees.

(3) The department shall promulgate any rules necessary to ensure the orderly implementation and administration of this section.

(4) If the credit granted pursuant to this section is not fully used in any one year, the unused amount may be carried foreward for a period not to exceed 5 years. The carryover credit may be used in a subsequent year when the tax imposed by this chapter for such year exceeds the credit for such year under this section after applying the other credits and unused credit carryovers in the order provided in s. 220.02(9).

Section 62. Paragraphs (c) and (d) of subsection (1) of section 212.92, Florida Statutes, as created by this act, and section 206.625, Florida Statutes, as amended by this act, are hereby repealed effective October 1, 1983.

Section 63. Paragraphs (a) of subsection (2), paragraph (b) of subsection (3) and paragraph (a) of subsection (4) of section 341.051, Florida Statutes, are amended to read:

341.051 Administration and financing of public transit programs and projects.—

(2) PUBLIC TRANSIT CONSTRUCTION AND IMPLEMENTATION PLAN.—

(a) The department shall prepare a 5-year public transit construction and implementation plan which shall be included in the department's 5-year construction plan prepared pursuant to s. 334.21(5). Provisions of s. 334.21 shall apply to public transit construction and implementation projects in the same manner that

they apply to road construction projects, except that s. 334.21(5)(b) shall not apply to public transit projects. *Planned department participation may be up to 50 percent of the nonfederal share of the costs of any eligible public transit capital project that is local in scope. Planned department participation shall not exceed 10 percent of the total project costs of federally assisted projects approved for federal funding prior to January 6, 1983, and 12.5 percent of the total project costs of such projects approved for federal funding after January 6, 1983, except that department participation in federally assisted ride-sharing programs may be up to 15 percent of the total project costs.*

(3) APPROPRIATION REQUESTS.—

(a) Public transit funds shall be requested on the basis of the funding required for the public transit construction and implementation plan.

[(b) Unless otherwise authorized by the Legislature, the department is prohibited from entering into any agreement or contract for any public transit project which would result in the ultimate expenditure or commitment of state funds in excess of $5 million. Any funds in excess of $5 million shall be appropriated from a revenue source other than the State Transportation Trust Fund, unless otherwise authorized by the Legislature.]

(b)[(c)] Appropriation requests shall identify each public transit project calling for state expenditure of $500,000 or more.

(c)[(d)] No state funds shall be allocated or expended for operation deficts of public transit projects, except as specifically allowed for approved service development projects.

(d)[(e)] Public transit service development projects shall be individually indentified in the department's appropriation request. Such request shall show a breakdown in funds showing capital and operating expense.

(4) PROJECT ELIGIBILITY.—Any project necessary to carry out those duties and responsibilities enumerated in s. 341.041 is eligible for expenditure of state funds in accordance with fund participation rates established herein, subject to the following conditions:

[(a) Unless otherwise authorized by the Legislature, the department is prohibited from entering into any agreement or contract for any public transit project which would result in the

ultimate expenditure or commitment of state funds in excess of $5 million. Any funds in excess of $5 million shall be appropriated from a revenue source other that the State Transportation Trust Fund, unless otherwise authorized by the Legislature.]

(a)[(b)] The project shall be for service or transportation facilities provided by the department under the provisions of this act, a public transit capital project, or a public transit service development project.

(b)[(c)] The project has been approved by the department as being consistent with standards established pursuant to provisions of this act.

Section 64. (1) This section, sections 1 through 6, and sections 54, 55, 56, and 62 of this act shall take effect March 14, 1983, provided that:

(a) The tax imposed pursuant to part II of chapter 212, Florida Statutes, as created by this act, shall be due and payable commencing April 1, 1983.

(b) The determination and notification required under s. 212.70(3) and (4), Florida Statutes, as created by this act, shall be made prior to April 1, 1983, and shall apply for the 14-month period April 1, 1983, through May 31, 1984.

(c) Notwithstanding the provisions of s. 212.95, Florida Statutes, as created by this act, 49.4 percent of the taxes remitted prior to July 1, 1983, under part II of chapter 212, Florida Statutes, as created by this act, exclusive of the service charge imposed by s. 215.20, Florida Statutes, shall be distributed to the State Transportation Trust Fund.

(d) The Department of Revenue is authorized to make expenditures necessary for the implementation of this act beginning March 7, 1983, and in making such expenditures the department shall be exempt from the requirements of part II of chapter 23, chapter 283, and part I of chapter 287, Florida Statutes, for a period of 120 days from said date.

(2) Sections 7 through 51 and 59 through 61 of this act shall take effect April 1, 1983, provided that this act shall not affect moneys due prior to April 1, 1983, pursuant to the first gas tax imposed by chapter 206, Florida Statutes.

(3) Sections 53 and 58 of this act shall take effect July 1, 1983.

(4) Section 57 shall take effect upon becoming a law.

(5) Section 52 shall take effect on May 1, 1983.

In The Florida Supreme Court
State of Florida

CASE NO. 64,035

STATE OF FLORIDA,
DEPARTMENT OF REVENUE,

Appellant,

vs.

AIR JAMAICA LIMITED, a foreign corporation;
AEROMAR C.por A., a foreign corporation;
AEROVIAS COLOMBIANAS LIMITADA, a foreign corporation;
CARIBBEAN AIR CARGO CO., LTD.; a foreign corporation;
GUYANA AIRWAYS CORPORATION, a foreign corporation;
HISPANIOLA AIRWAYS C. por A., a foreign corporation
LINEAS AEREAS del CARIBE, S.A., a foreign corporation;
TACA INTERNATIONAL AIRLINES, S.A., a foreign corporation;
COMPANIA PERUANA de AVIACION "FAUCETT", S.A., a foreign corporation;
AEROSERVICIOS ECUATORIANOS C.A., a foreign corporation;
AERONAVES del PERU, S.A., a foreign corporation
and
TRANSPORTES AEREOS MERCANTILES PANAMERICANOS, S.A., a foreign corporation,

Appellees.

_____/

MOTION FOR REHEARING

Appellees move for a rehearing in the above styled cause and show:

1. This court in addressing the issue of aviation fuel tax as it relates to international agreements adopted the opinion of

Department of Revenue v. Wardair Canada Ltd., No. 64,036 (Fla. June 14, 1984). The court stated at page 3 of the *Air Jamaica* opinion:

> In the present case [Department of Revenue v. Air Jamaica, et al.] the airlines have not produced any facts which would enable us to hold contrary to our holding in *Wardair* where we found that the tax did not violate any international agreement.

2. At page 4 of the *Wardair* opinion this court stated:

> "The provisions in the agreement between the United States and Canada clearly express an intent to apply to *only national taxes and duties.* We do not believe that the scheme of this agreement is so pervasive so as to permit the reasonable inference that Congress intended to preclude the states' power to tax." (emphasis added)

3. Each bilateral agreement between the United States and the respective governments of the appellee air carriers must be considered on their own merits. The Canadian and United States bilateral agreement is not necessarily the same as the existing agreements between the appellees' governments and the United States.

4. The governments of El Salvador, Barbados and Jamaica have entered into bilateral agreements with the United States as follows: El Salvador, Civil Aviation Agreement TIAS 10488; Barbados, Air Transport Agreement TIAS 10370; and Jamaica, Air Transport Services Agreement TIAS 6770 and Air Transport Services Protocol TIAS 9613. Each of these bilateral agreements contain the following language:

> Each party shall use its best efforts to secure for the designated airlines of the other party, on the basis of reciprocity, *an exemption from taxes,* duties, charges and fees *imposed by state,* regional and local authorities on the items specified in paragraphs (1) and (2) of this article, as well as from fuel through put charges, in the circumstances described in this article, except to the extent that the charges are based on the actual cost of providing the service. (emphasis added)

The references in paragraphs (1) and (2) of this above article refers to taxes imposed upon fuel, in addition to other items which are not germane to this litigation.

5. These provisions of these bilateral agreements are contrary to this court's statement at page 5 of the *Wardair* opinion wherein it states in part:

> "The agreement provides for efforts at *exemption from national excise taxes*, inspection fees and other national charges, *but does not provide for exemption from state excise taxes.*" (emphasis added)

Although appellees do not agree with the majority opinion as it pertains to the national tax application, appellees assert that their agreements as stated above do apply to state taxes.

6. The other appellees' governments agreements with the United States contain language similar to that found in Article III (b) of the Air Transport Service Agreement between the United States and the Republic of Peru which states in material part:

> (b) fuel, lubricating oils, and spare parts introduced into the territory of one contracting party by the other contracting party or its nationals, and intended solely for use by aircraft of the airlines of such contracting party shall, with respect to the imposition of customs, duties, inspection fees and other national duties or charges by the contracting party whose territory is entered be accorded the same treatment as that applying to the national airlines and *to airlines of most favored nations*. (emphasis added)

Further, all of the agreements contain language requiring the governments to take all appropriate action within its jurisdication to eliminate all forms of discrimination or unfair competitive practice affecting the airlines of the other party. These above stated provisions place all the appellee airlines in the same position concerning state taxation as the agreements of El Salvador, Jamaica and Barbados.

7. At page 4 of the *Wardair* opinion this court stated in part:

> "Also, the competitive equality between the two nations would be destroyed if the United States air carriers had to pay state excise taxes on fuel purchases and the Canadian carrier did not."

Appellees believe that this court has misapprehended the status of competitive equality between the domestic carriers and foreign carriers concerning the state excise tax on fuel purchases. It is clear

that both the United States, its domestic carriers and the foreign governments and their respective carriers are bound by their respective agreements, therefore, the only conclusion that can be reached is that the United States' air carriers would not have to pay state excise taxes on fuel purchases when operating in international commerce whether they refueled in the State of Florida or in the foreign countries who are parties to the agreements. Failure of the domestic carriers to raise this issue at trial does not affect the intent and application of the agreement.

8. Although appellees were not given the privilege to orally argue their position, these matters raised above were briefed in appellees' answer brief filed in this cause.

WHEREFORE, appellees respectfully request this court to grant a rehearing in this cause to consider the issues and matters herein raised.

Respectfully submitted,

LAGER, WOODWARD, O'STEEN & KEARNEY
320 West Park Avenue
P.O. Box 494
Tallahassee, FL 32301
(904) 222-4848

BY: _____
THOMAS W. LAGER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion For Rehearing has been furnished by hand delivery to Larry E. Levy, General Counsel, Department of Revenue, State of Florida, Room 203, Carlton Building, Tallahassee, FL 32301 and Joseph C. Mellichamp, Esquire, Department of Legal Affairs, The Capitol, Tallahassee, FL 32301 this 26th day of June, 1984.

THOMAS W. LAGER, ESQUIRE

In The
Supreme Court of Florida
Wednesday, September 12, 1984

CASE NO. 64,035
Circuit Court Case No. 83-968
(Leon)

DEPARTMENT OF REVENUE
Appellant,
vs.
AIR JAMAICA LTD., et al.,
Appellees.

On consideration of the motion for rehearing filed by attorneys for appellees, and response thereto,

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

BOYD, C.J., ADKINS, OVERTON, ALDERMAN, McDONALD and SHAW, JJ., Concur

A True Copy
TEST:

C

cc: Hon. Paul F. Hartsfield, Clerk
Hon. Ben C. Willis, Chief Judge

Thomas W. Lager, Esquire
Jerry M. Dale, Esquire
Morton H. Silver, Esquire
Joseph C. Mellichamp, III, Esquire
Larry Levy, Esquire

Sid J. White
Clerk Supreme Court

Mandate
Supreme Court of Florida

To the Honorable, the Judges of the
Circuit Court in and for Leon County, Florida

WHEREAS, in that certain cause filed in this Court styled:

DEPARTMENT OF REVENUE, v. AIR JAMAICA LTD., et. al.

Case No. 64,035
Your Case No. 83-968

The attached opinion was rendered on June 14, 1984 ,

YOU ARE HEREBY COMMANDED that further proceedings be had in accordance with said opinion, the rule of this Court and the laws of the State of Florida.

WITNESS the Honorable Joseph A. Boyd, Jr.
Chief Justice of the Supreme Court of Florida and the Seal of said Court at Tallahassee, the Capital,

on this 12th day of September, 1984

Clerk of the Supreme Court of Florida.

In The Supreme Court
State of Florida

CASE NO. 64,035

STATE OF FLORIDA, DEPARTMENT
OF REVENUE,

Appellant,

vs.

AIR JAMAICA LIMITED, a foreign corporation;
AEROVIAS COLOMBIANAS LIMITADA, a foreign corporation;
CARIBBEAN AIR CARGO CO., LTD; a foreign corporation;
GUYANA AIRWAYS CORPORATION, a foreign corporation;
LINEAS AEREAS del CARIBE, S.A., a foreign corporation;
TACA INTERNATIONAL AIRLINES, S.A., a foreign corporation;
COMPANIA PERUANA de AVIACION "FAUCETT", S.A., a foreign corporation;
AERONAVES del PERU, S.A., a foreign corporation,
and
TRANSPORTES AEREOS MERCANTILES
PANAMERICANOS, S.A., a foreign corporation,

Appellees,

_____/

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that AIR JAMAICA LIMITED; AEROVIAS COLOMBIANAS LIMITADA; CARIBBEAN AIR CARGO CO., LTD.; GUYANA AIRWAYS CORPORATION; LINEAS AEREAS del CARIBE, S.A.; TACA INTERNATIO-

NAL AIRLINES, S.A.; COMPANIA PERUANA de AVIACION "FAUCETT", S.A.; AERONAVES del PERU, S.A.; and TRANSPORTES AEREOS MERCANTILES PANAMERICANOS, S.A., the Plaintiffs/ Appellees above named, hereby appeal to the Supreme Court of the United State from the Final Decree of the Supreme Court of FLorida which affirmed that portion of the Circuit Court's Order upholding the Florida tax on aviation fuel as constitutional and reversed that portion of the Circuit Court's Order insofar as it recognized an exemption from the tax for the above Plaintiffs/ Appellees and reversed that portion of the Circuit Court's Order insofar as it upheld the corporate income tax credit to Florida-based airlines, entered in this action of June 14, 1984, rehearing denied September 12, 1984.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

DATED this 28th day of September, 1984.

J.C. O'STEEN
Lager, Woodward, O'Steen
& Kearney
Attorneys for Plaintiffs/
Appellees
320 West Park Avenue
Tallahassee, Florida 32301
(904) 222-4848

AFFIDAVIT OF SERVICE BY MAIL

STATE OF FLORIDA :
COUNTY OF LEON :ss

I, J.C. O'STEEN, depose and say that I am an attorney in the office of Lager, Woodward, O'Steen & Kearney, Attorneys of record for Plaintiffs/ Appellees, AIR JAMAICA LIMITED; AEROVIAS COLOMBIANAS LIMITADA; CARIBBEAN AIR CARGO CO., LTD.; GUYANA AIRWAYS CORPORATION; LINEAS AEREAS del CARIBE, S.A.; TACA INTERNATIONAL

AIRLINES, S.A.; COMPANIA PERUANA de AVIACION "FAUCETT" S.A.; AERONAVES del PERU, S.A.; TRANSPORTES AERERROS MERCANTILES PANAMERICANOS, S.A.; and that on September 28, 1984, pursuant to Rule 28, Rules of the Supreme Court, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on each of the parties required to be served herein, as follows:

On Defendant/Appellant, STATE OF FLORIDA, DEPARTMENT OF REVENUE, by mailing copies in duly addressed envelopes, with first class postage prepaid, to LARRY E. LEVY, Esq., General Counsel, State of Florida, Department of Revenue, Room 203, Carlton Building, Tallahassee, Florida 32301; and to JOSEPH C. MELLICHAMP, Esq., Assistant General Counsel, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32301.

All parties required to be served have been served.

J.C. OSTEEN

SWORN TO and SUBSCRIBED before me this 28th day of September, 1984.

Notary Public
My Commission Expires;

AIR TRANSPORT SERVICES

Agreement Between the
UNITED STATES OF AMERICA
and JAMAICA

Signed at Kingston October 2, 1969

with

Exchange of Notes

* * *

ARTICLE 8

A. Each Contracting Party shall exempt the designated airline or airlines of the other Contracting Party to the fullest extent possible under its national law, on the basis of reciprocity, from import restrictions, customs duties, excise taxes, inspection fees, and other national duties and charges on fuel, lubricants, consumable technical supplies, spare parts including engines, regular equipment, ground equipment, stores, and other items intended for use solely in connection with the operation or servicing of aircraft of the airlines of such other Contracting Party engaged in international air service. The exemptions provided under this paragraph shall apply to items:

(1) Introduced into the territory of one Contracting Party by or on behalf of the designated airlines of the other Contracting Party;
(2) Retained on aircraft of the designated airlines of one Contracting Party upon arriving in or leaving the territory of the other Contracting Party; or
(3) Taken on board aircraft of the designated airlines of one Contracting Party in the territory of the other and intended for use in international air service;

whether or not such items are used or consumed wholly within the territory of the Contracting Party granting the exemption.

B. The exemptions provided for by this Article shall also be available in situations where the designated airline or airlines of one Contracting Party have entered into arrangements with another

airline or airlines for the loan or transfer in the territory of the other Contracting Party of the items specified in paragraph A, provided such other airline or airlines similarly enjoy such exemptions from such other Contracting Party.

TREATIES AND OTHER INTERNATIONAL ACTS SERIES 9613

AIR TRANSPORT SERVICES

Protocol Between the
UNITED STATES OF AMERICA
and JAMAICA

Amending the Agreement of
October 2, 1969

Signed at Kingston April 4, 1979

with

Exchange of Notes

* * *

ARTICLE 10
Commercial Operations

(1) The airlines of one Party shall have the right to establish offices in the territory of the other Party for the promotion and sale of their services.

(2) The designated airlines of one Party shall have the right, in accordance with the laws and regulations relating to entry, residence and employment of the other Party, to bring in and maintain in the territory of the other Party their own managerial, technical, operational and other specialist staff who are required to support the provision of air services.

(3) Each designated airline may perform its own ground handling in the territory of the other Party ("self-handling") or, at its option, select among competing agents for such services. These rights shall be subject only to physical constraints resulting from considerations of airport safety. Where such considerations preclude self-handling or the availability of competing agents, ground services shall be available on an equal basis to all airlines; charges may reflect, but shall not exceed, the full costs of services provided, including a reasonable rate of return on investment; and such services shall be comparable to the kind and quality of services if self-handling were possible.

(4) Each Party grants to each designated airline of the other party the right to engage in the sale of air transportation in its territory directly and, at the airline's discretion, through its agents. In the case of charter services, however, such sales shall be subject to the applicable respective rules on a non-discriminatory basis. Any airline shall be free to sell such transportation in the currency of that territory, or in freely convertible currencies of other countries.

(5) Each designated airline shall have the right to convert and remit to its country on demand local revenues in excess of sums locally disbursed. Conversion and remittance shall be permitted without restictions or remittance taxation at the rate of exchange applicable to current transactions and remittance.

(6) Each Party shall use its best efforts to secure for the designated airlines of the other Party, on the basis of reciprocity, an exemption from taxes, duties, charges and fees imposed by State, regional and local authorities on the items specified in paragraph A of Article 8 of the Agreement, as well as from fuel through-put charges, in the circumstances described in Article 8 of the Agreement, except to the extent that the charges are based on the actual cost of providing the service.

(7) User charges shall be established at reasonable and non-discriminatory levels, consistent with the costs of providing the relevant services and facilities, and be equitably apportioned among categories of users.

(8) Article 11 of the Agreement is rescinded.

COLOMBIA

Aviation: Transport Services

Agreement signed at Bogotá October 24, 1956;
Entered into force provisionally January 1, 1957.
With exchange of notes.

AIR TRANSPORT AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE REPUBLIC OF COLOMBIA.

The Government of the United States of America and the Government of the Republic of Colombia,

Desiring to conclude an Agreement for the purpose of promoting and regulating air communications between their respective territories,

Have appointed as their Plenipotentiaries:

His Excellency the President of the United States of America:

Mr. Philip W. Bonsal, Ambassador Extraordinary and Plenipotentiary of the United States of America, accredited to the Government of the Republic of Colombia,

and

His Excellency the President of the Republic of Colombia:

Dr. José Manuel Rivas Sacconi, Minister for Foreign Relations, and Mr. Mauricio Obregón, Ambassador Extraordinary and Plenipotentiary of the Republic of Colombia, accredited to the Government of the Republic of Venezuela;

Who, having communicated their respective full powers found to be in due form, have agreed as follows:

* * *

ARTICLE 7

In order to prevent discriminatory practices and to assure equality of treatment, both contracting parties agree that:

(A) Each of the contracting parties may impose or permit to be imposed just and reasonable charges for the use of public airports and other facilities under its control. Each of the contracting parties agrees, however, that these charges shall not be higher than would be paid for the use of such airports and facilities by its national aircraft engaged in similar international services.

(B) Fuel, lubricating oils, consumable technical supplies, spare parts, regular equipment, and stores introduced in the into the territory of one contracting party by the the other contacting party or its nationals, and intended solely for use by aircraft of such contracting party shall be exempt on a basis of reciprocity from customs duties, inspection fees and other national duties or charges.

(C) Fuel, lubricating oils, consumable technical supplies, spare parts, regular equipment, and stores retained on board aircraft of the airlines of one contracting party authorized to operate the routes and services provided for this Agreement shall, upon arriving in or leaving the territory of the other contacting party, be exempt on a basis of reciprocity from customs duties, inspection fees and other national duties or charges, even though such supplies be used or consumed by such air craft on flights in that territory.

(D) Fuel, lubricating oils, consumable technical supplies, spare parts, regular equipment, and stores taken on board aircraft of the airlines of one contracting part in the territory of the other and used in international services shall be exempt on a basis of reciprocity from customs duties, excise taxes, inspection fees and other national duties or charges.

AIR TRANSPORT SERVICES

Agreement, with annex, signed at Bermuda February 11, 1946
Entered into force February 11, 1946
Amended by agreements of December 20, 1946 and January 27, 1947;[1] May 21 and 23, 1947;[2] January 14, 1948;[3] August 4 and 16, 1955;[4] October 17 and 30, 1956;[5] December 2 and 28, 1956;[6] and May 27, 1966[7]

60 Stat. 1499, Treaties and Other
International Acts Series 1507

AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE UNITED KINGDOM RELATING TO AIR SERVICES BETWEEN THEIR RESPECTIVE TERRITORIES

The Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland,

Desiring to conclude an Agreement for the purpose of promoting direct air communications as soon as possible between their respective territories,

Have accordingly appointed authorized representatives for this purpose who have agreed as follows:

* * *

---

[1]TIAS 1640, *post*, p. 809.
[2]TIAS 1641, *post*, p. 814.
[3]TIAS 1714, *post*, p., 847.
[4]6 UST 2929; TIAS 3338.
[5]7 UST 2934; TIAS 3675.
[6]7 UST 3451; TIAS 3719.
[7]17 UST 683; TIAS 6019.

Article 3

(1) The charges which either of the Contracting Parties may impose, or permit to be imposed, on the designated air carrier or carriers of the other Contracting Party for the use of airports and other facilities shall not be higher than would be paid for the use of such airports and facilities by its national aircraft engaged in similar international air services.

(2) Fuel, lubricating oils and spare parts introduced into, or taken on board aircraft in, the territory of one Contracting Party by, or on behalf of, a designated air carrier of the other Contracting Party and intended soley for use by the aircraft of such carrier shall be accorded, with respect to customs duties, inspection fees or other charges imposed by the former Contracting Party, treatment not less favourable than that granted to national air carriers engaged in international air services or such carriers of the most favoured nation.

(3) Supplies of fuel, lubricating oils, spare parts, regular equipment and aircraft stores retained on board aircraft of a designated air carrier of one Contracting Party shall be exempt in the territory of the other Contracting Party from customs duties, inspection fees or similiar duties or charges, even though such supplies be used by such aircraft on flights within that territory.

Air Transport Agreement Between The Government of Barbados and The Government of The United States of America

The Government of Barbados and the Government of the United States of America;

Desiring to promote an international air transport system based on competition among airlines in the marketplace with minimum governmental interference and regulation;

Desiring to facilitate the expansion of international air transport opportunities;

Desiring to make it possible for airlines to offer the traveling and shipping public a variety of service options at the lowest prices that are not predatory or discriminatory and do not represent abuse of a dominant position and wishing to encourage individual airlines to develop and implement innovative and competitive prices;

Desiring to ensure the highest degree of safety and security in international air transport and reaffirming their grave concern about acts or threats against the security of aircraft, which jeopardize the safety of persons or property, adversely affect the operation of air transportation, and undermine public confidence in the safety of civil aviation;

Being Parties to the Convention on International Civil Aviation opened for signature at Chicago on December 7, 1944;

Desiring to conclude a new agreement covering all forms of air transportation to replace the Understanding on Air Transport Services effected by Exchange of Notes at Bridgetown dated on April 14 and 27, 1972, as amended;

Have agreed on follows:

* * *

Article 9
Customs and Duties and Taxes

(1) On arriving in the territory of one Party, aircraft operated in international air transportation by the designated airlines of the other Party, their regular equipment, ground equipment, fuel, lubricants, consumable technical supplies, spare parts including engines, aircraft stores (including but not limited to such items as food, beverages and liquor, tobacco and other products destined for sale to or use by passengers in limited quantities during the flight), and other items intended for or used solely in connection with the operation or servicing of aircraft engaged in international air transportation shall be exempt, on the basis of reciprocity, from all import restrictions, property taxes and capital levies, customs duties, excise taxes and similar fees and charges imposed by the national authorities, and not based on the cost of services provided, provided such equipment and supplies remain on board the aircraft.

(2) There shall also be exempt, on the basis of reciprocity, from the taxes, duties, fees and charges referred to in paragraph (1) of this Article, with the exception of charges based on the cost of the service provided:

(a) aircraft stores introduced into or supplied in the territory of a Party and taken on board, within reasonable limits, for use on outbound aircraft of a designated airline of the other Party engaged in international air transportation, even when these stores are to be used on a part of the journey performed over the territory of the Party in which they are taken on board;

(b) ground equipment and spare parts including engines introduced into the territory of a Party for the servicing, maintenance or repair of aircraft of a designated airline of the other Party used in international air transportation; and

(c) fuel, lubricants and consumable technical supplies introduced into or supplied in the territory of a Party for use in an aircraft of a designated airline of the other Party engaged in international air transportation, even when these supplies are to be used on a part of the journey performed over the territory of the Party in which they are taken on board.

(3) Equipment and supplies referred to in paragraphs (1) and (2) of this Article may be required to be kept under the supervison or control of the appropriate authorities.

(4) The exemptions provided for by this Article shall be also available where the designated airlines of one Party have contracted with another airline, which similarly enjoys such exemptions from the other Party, for the loan or transfer in the territory of the other Party of the items specified in paragraphs (1) and (2) of this Article.

(5) Each Party shall use its best efforts to secure for the designated airlines of the other Party, on the basis of reciprocity, an exemption from taxes, duties, charges and fees imposed by State, regional and local authorities on the items specified in paragraphs (1) and (2) of this Article, as well as from fuel through-put charges, in the circumstances described in this Article, except to the extent that the charges are based on the actual cost of providing the serivce.

AIR TRANSPORT SERVICES

Agreement with annex and exchanges of notes signed at Lima December 27, 1946
Entered into force December 27, 1946
Supplemented by agreement of May 6 and 8 and July 21, 1947[1]
Exchange of notes concerning 30 percent ownership clause canceled May 26, 1950
Annex amended by agreements of April 24 and May 28, 1958,[2] *and March 2, 1966*[3]

61 Stat. 2586; Treaties and Other
International Acts Series 1587

Air Transport Agreement

The Governments of the United States of America and the Republic of Peru, desiring to stimulate and promote the development of Air Transportation between both countries, and having in mind the recommendations of Section VIII of the Final Act of the Conference on International Civil Aviation, signed in Chicago on the seventh of December, 1944, have resolved to sign an Air Transport Agreement and for that purpose have designated their respective Plenipotentiaries to wit:

His Excellency the President of the United States of America,
Their Excellencies

Mr. Prentice Cooper, Ambassador Extraordinary and Plenipotentiary before the Government of Peru, and

Mr. William Mitchell, Special Representative and Minister Plenipotentiary specially accredited for this purpose,

His Excellency the President of the Republic of Peru,
Their Excellencies Señores
Enrique Garcia Sayán, Minister for Foreign Affairs, and
Enrique Gongora, Minister of Aeronautics.

who, after exchanging their full powers which they have found to be in good and proper form, have agreed that the establishment and development of air transport services between their respective territories shall be subject to the provisions of the present agreement and of its annex as follows:

* * *

[1]TIAS 1587, *post*, p.1264
[2]9 UST 900; TIAS 4050.
[3]17 UST 1194; TIAS 6080.

Article 3

In order to prevent discriminatory practices and to assure equality of treatment, both contracting parties agree that:

(a) Each of the contracting parties may impose or permit to be imposed just and reasonable charges for the use of public airports and other facilities under its control. Each of the contracting parties agrees, however, that these charges shall not be higher than would be paid for the use of such airports and facilities by its national aircraft engaged in similar international services.

(b) Fuel, lubricating oils, and spare parts introduced into the territory of one contracting party by the other contracting party or its nationals, and intended solely for use by aircraft of the airlines of such contracting party shall, with respect to the imposition of customs duties, inspection fees or other national duties or charges by the contracting party whose territory is entered, be accorded the same treatment as that applying to national airlines and to airlines of the most-favored nation.

(c) The fuel, lubricating oils, spare parts, regular equipment and aircraft stores retained on board civil aircraft of the airlines of one contracting party authorized to operate the routes and services described in the Annex shall, upon arriving in or leaving the territory of the other contracting party, be exempt from customs, inspection fees or similar duties or charges, even though such supplies be used or consumed by such aircraft on flights in that territory.

Air Transport Agreement Between The Government of the United States of America And The Government of El Salvador

The Government of the United States of America and the Government of El Salvador;

Desiring to promote an international air transport system based on competition among airlines in the marketplace with minimum governmental interference and regulation;

Desiring to facilitate the expansion of international air transport opportunities;

Desiring to make it possible for airlines to offer the traveling and shipping public a variety of service options at the lowest prices that are not predatory or discriminatory and do not represent abuse of a dominant position and wishing to encourage individual airlines to develop and implement innovative and competitive prices;

Desiring to ensure the highest degree of safety and security in international air transport and reaffirming their grave concern about acts or threats against the security of aircraft, which jeopardize the safety of persons or property, adversely affect the operation of air transportation, and undermine public confidence in the safety of civil aviation;

* * *

Have agreed as follows:

* * *

Article 9
Customs Duties and Taxes

(1) On arriving in the territory of one Party, aircraft operated in international air transportation by the designated airlines of the other Party, their regular equipment, ground equipment, fuel, lubricants, consumable technical supplies, spare parts including engines, aircraft stores (including but not limited to such items as food, beverages and liquor, tobacco and other products destined for sale to or use by passengers in limited quantities during the flight), and other items intended for or used soley in connection with the operation or servicing of aircraft engaged in international air transportation shall be exempt, on the basis reciprocity, from all import restrictions, property taxes and capital levies, customs duties, excise taxes, and similar fees and charges imposed by the national authorities, and not based on the cost of services provided, provided such equipment and supplies remain on board the aircraft.

(2) There shall also be exempt, on the basis of reciprocity, from the taxes, duties, fees and charges referred to in paragraph (1) of this Article, with the exception of charges based on the cost of the service provided:

(a) aircraft stores introduced into or supplied in the territory of a Party and taken on board, within reasonable limits, for use on outbound aircraft of a designated airline of the other Party engaged in international air transportation, even when these stores are to be used on a part of the journey performed over the territory of the Party in which they are taken on board;

(b) ground equipment and spare parts including engines introduced into the territory of a Party for the servicing, maintenance or repair of aircraft of a designated airline of the other Party used in international air transportation; and

(c) fuel, lubricants and consumable technical supplies introduced into or supplied in the territory of a Party for use in an aircraft of a designated airline of the other Party engaged in international air transportation, even when these supplies are to be used on a part of the journey performed over the territory of the Party in which they are taken on board.

(3) Equipment and supplies referred to in paragraphs (1) and (2) of this Article may be required to be kept under the supervision or control of the appropriate authorities.

(4) The exemptions provided for by this Article shall also be available where the designated airlines of one Party have contracted with another airline, which similarly enjoys such exemptions from the other Party, for the loan or transfer in the territory of the other Party of the items specified in paragraphs (1) and (2) of this Article.

(5) Each Party shall use its best efforts to secure for the designated airlines of the other Party, on the basis of reciprocity, an exemption from taxes, duties, charges and fees imposed by State, regional and local authorities on the items specified in paragraphs (1) and (2) of this Article, as well as from fuel through-put charges, in the circumstances described in this Article, except to the extent that the charges are based on the actual cost of providing the service.

In The Second Circuit Court
In And For Leon County,
Florida

CASE NO: 83-964

LINEAS AEREAS COSTARRICENSES, S.A.,
a Costa Rican Corporation,

Plaintiff.

vs.

STATE OF FLORIDA,
DEPARTMENT OF REVENUE

Defendant.

_____/

FINAL JUDGEMENT

This cause is before the Court on final hearing on the pleadings, evidence and arguments of counsel for the respective parties and the intervenors, and on the briefs of counsel for the parties, and the Court having considered all of same and being otherwise advised in the premises, it is

ORDERED AND ADJUDGED:

1. The Plaintiff asserts that Senate Bill No. 8-A, Chapter 83-3, Laws of Florida, title "an act relating to transportation finance and administration":

COUNT I: discriminates against foreign airlines in violation of Congress' exclusive power over foreign commerce, pursuant to Article I, Section 8, Clause 3 of the United States Constitution,

COUNT II: is inconsistent with the Air Transport Services Agreements lawfully entered into by the President of the United States,

COUNT III: denies foreign airlines equal protection of the laws under the United States Constitution,

COUNT IV: violates Article I, Section 9, of the Florida Constitution because there is no reasonable relationship between the taxes imposed and the services provided to foreign airlines, and

COUNT V: is a special law in violation of sections 10 and 11 of Article III of the of the Constitution of the State of Florida.

Plaintiff prays for a permanent injunction to prevent Defendant Department of Revenue (DOR) from assessing and collecting fuel taxes pursuant to Sentate Bill 8-A.

2. In light of this Court's recent decision in *Delta Air Lines, Inc. v. State of Florida, Department of Revenue,* Case No. 83-761, (Leon County Circuit Court-Civil Division, May 23, 1983), the assertion in Counts I, III, IV, and V are without merit. However, the Court finds merit in the assertion in Count II and hereby grants a permanent injunction for the reasons subsequently discussed. This Court upholds the constitutionality of Senate Bill 8-A but recognizes an exemption for foreign airlines based on the bilateral agreements entered into between the federal government and Plaintiffs and intervenors in this case.[1]

---

[1] Commercial Air Transport Agreement, January 8, 1947, United States - Ecuador, T.I.A.S. 1606; Aviation Transport Services Agreement, October 24, 1956, United States - Colombia, T.I.A.S. 5338; Air Transport Services Agreement, April 13, 1953, United States - Venezuela, T.I.A.S. 2813; Air Transport Services Agreement, August 15, 1960, United States - Mexico, T.I.A.S. 4675; Air Transport Services Agreement, May 10, 1947, United States - Chile, T.I.A.S. 1905; Air Transport Services Agreement, September 22, 1977, United States - Argentina, T.I.A.S. 8978; Air Transport Services Agreement, February 11, 1946, United States - United Kingdom, T.I.A.S. 1507; Aviation Agreement, November 22, 1961, United States - United Kingdom, T.I.A.S. 4955; Memorandum of Consultations, April 25, 1982, United States - Brazil; Memorandum of Understanding, August 17, 1979, United States - Costa Rica.

Discussion

The Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3 vests with Congress the exclusive power to regulate foreign commerce. The Supremacy Clause, Article 4, Section 2, states that the Constitution and the laws made pursuant thereto, are the supreme law of the land. Therefore when Congress traditionally regulates in a certain area such as in the present case by extending reciprocal agreements to foreign airlines to "strengthen even more the cultural welfare and economic bonds . . . and ensure continued development in the common welfare on bases of equality and reciprocity", Air Transport Services Agreement with Mexico, p. 1, the states are preempted or superseded from acting in this area. Further, Congress has extended federal tax exemption from custom duties, inspection fees, excise taxes, and other national duties or charges to foreign airlines "in order to prevent discriminatory practices and to assure equality of treatment." Air Transport Services Agreement with Mexico, Article 7,[2] and that the respective authorities will attempt to facilitate maximum efficiency "with a fair and equal opportunity" for the airlines to operate on the designated routes. Mexico Agreement, Article 8.[3]

---

[2] Similar or equal provisions appear in the Air Transport Services Agreements listed in footnote 1 as follows: Venezuela Agreement - Article 4; Chile Agreement - Article 3; Ecuador Agreement - Article 3; United Kingdom Agreement - Article 3; Costa Rica Memorandum - Article 9; Brazil Agreement - Article 9; Colombia Agreement - Article 7; Argentina Agreement - Section 2(F).

[3] Similar or equal provisions appear in the Air Transport Services Agreements listed in footnote 1 as follows: Venezuela Agreement - Annex IV(b); Chile Agreement - Annex A.A; Ecuador Agreement - Annex Section 1.A; Costa Rica Memorandum - Article 9(5), Brazil Memorandum - Section IX. Colombia Agreement - Article 8; Argentina Agreement - Section 2(F).

Defendant contends that the "fair and equal opportunity" refers only to routes and does not affect excise tax imposition. Fuel is an essential factor in an airlines' operation, and if its price is increased, the cost to fly to a specific destination is likewise increased. This will adversely affect the economic feasibility of flying to that destination. The foreign airlines involved in this suit fly only between their country and specified cities in the United States. In Florida that city is Miami. They engage in no intrastate or interstate flights, but are confined to flights between their country and the specific city. If a particular state imposes a substantial increase in the cost of flying to a certain city, it is only logical that this disadvantage would inhibit the airlines' desire to continue flying to that city. Therefore, tax imposition does substantially affect the established route and denies the airlines a fair and equal opportunity to serve that route.

It is noteworthy that in the Argentina Agreement, Section 2(F)(3), the wording is that the civil aeronautics authorities will endeavor to ensure "exemption from taxes", without specifying exemption only from national taxes. Most of the agreements specify the referral is to national taxes and Defendant emphasizes this point in its brief as indicating Congress intentionally did not exempt state or local taxes. Consistent with this reasoning, however, Argentina could submit that the failure to specify would imply the federal government would make efforts to ensure exemption from all taxes - state, local, etc. In fact, the memorandum agreement with Costa Rica, Article 9(5) does in fact state that "each party shall use its best efforts to secure for the designated airlines of the other Party, on the basis of reciprocity, an exemption from taxes, duties, charges and fees imposed by State, regional and local authorities".

In arguing that Congress' failure to specifically exempt state taxes in the majority of the agreements, Defendent cites *Finland v. Town of Pelham*, 290 N.Y.S., 2d (1966), to demonstrate an express statement of Congress in a treaty as compared to the non-express statements in the present agreements. However, it cannot be concluded that whenever Congress does not speak to an issue that the intent is to affirm state regulation in that area by negative implication. Congress cannot be expected to speak to all aspects of a given situation. The United States Supreme Court spoke directly on this situation in *Japan Line, Ltd., v. County of Los Angeles*, 441 U.S. 434, 451 (1979):

> "The premise of Appellees' argument is that a State is free to impose demonstrable burdens on commerce, so long as Congress has not preempted the field by affirmative regulation. But it long has been 'accepted constitutional doctrine that the commerce clause, without the aid of Congessional legislation . . . affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interest.'" *Southern Pacific Company v. Arizona ex rel. Sullivan,* 325 U.S. 761, 769 (1945).

Similarly, Defendant argues that the agreements between the United States and Costa Rica, Brazil, Trindad and Tobago, and Honduras are executory and require affirmative legislative action to validate them. *United States v. Postal,* 589 F. 2d 862 (5th Cir. 1979). The court in Postal states at page 875:

> "it was early decided that treaties affect the municipal law of the United States only when those treaties are given effect by congressional legislation or are, by their nature, self-executing."

but goes to say at page 876:

> "The question whether a treaty is self-executing is a matter of interpretation for courts when the issue presents itself in litigation ... and, as in the case of all matters of interpretation, the court's attempt to discern the intent of the parties to the agreement so as to carry out their manifest purpose."

The agreements involved here have no express language that further legislation is necessary, and because, as will be discussed, the federal government recognizes these agreements as effective, this court discredits any argument that these agreements are ineffective because further legislative action is needed. As Plaintiff informs the Court, the challenged agreements are in effect pending exchange of ratification, and the Civil Aeronautics Board recognizes these agreements as effective by having granted Foreign Air Carrier Permits to Costa Rica and by recognizing the validity of the Brazil agreement in decisions. The T.I.A.S. agreements 1507, 4955, and 5209 govern air transportation with Trinidad and Tobago, such agreements made

between the United Kingdom and United States. Although no T.I.A.S. agreement exists for Honduras, TAN, the national carrier has been authorized by the Civil Aeronautics Board C.A.B. Order 82-6-98 (June, 1982). Even if there were a valid distinction between the effectiveness of an executory agreement as opposed to an executed agreement, the Court here is examining the federal *policy* considerations behind the agreements and these considerations strongly indicate lenient tax burdens on foreign carriers. The agreements, executory or executed, are evidence of this policy as the Supreme Court stated in *United States v. Pink,* 315 U.S. 203, 231 (1941): as "superior Federal policy evidenced by a treaty or international compact or agreement."

Defendant argues in its brief that Plaintiff is trying to elevate the agreements to the status of treaties and appears to discredit this elevation; yet Defendant's cites involve treaties which implies Defendant's recognition of that status. *Pink* appears to treat international agreements with the same to status of treaties, so the distinction is irrelevant.

Regarding the non-express language in the agreements, Defendant cites *Guarantee Trust Co., v. United States,* 304 U.S. 126, 143 (1938):

> "Even the language of a treaty wherever reasonably possible will be construed so as not to override state laws or to impair rights arising under them."

In the present case, it seems to be the state who is trying to override the privileges extended to foreign carriers by the federal government, not vice versa. All the bilateral agreements were in effect before Senate Bill 8-A, dating back to 1947 (Ecuador), 1948 (Chile), 1953 (Venezuela) etc. This would seem to indicate that the federal government had established their policy of reciprocal tax exemptions before the state acted. It is therefore, the state who is impairing a federal right, not vice versa. Defendant also cites *United States v. Pink* at 230:

> "It is of course true that even treaties with foreign nations will be carefully construed so as not to derogate from the authority and jurisdiction of the States of this nation unless clearly necessary to effectuate the national policy."

However, *Pink* goes on to say at p. 231:

> "But state law must yield when it is inconsistent with or impairs the policy or provisions of a treaty or of an international agreement."

Using the *Pink* analysis, derogation from the State's authority in this case is in fact necessary because the apparent policy expressed in the bilateral agreement is for reciprocal tax advantages. This precludes the state from acting in a manner to "frustrate the achievements of federal uniformity." *Japan Line*, p. 450. The federal concern for equal commercial opportunity between nations supports the policy of Congress to exempt foreign airlines from excise taxes.

The Supreme Court of the United States in *United States v. Belmont*, 301 U.S. 324,331 (1947), has rather clearly stated the applicable principle as follows:

> "in the case of all international compacts and agreements ... that complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states."

The test to be used when a state attempts to regulate foreign commerce was articulated in *Japan Line*, page 451:

> "an inquiry more elaborate than that mandated by *Complete Auto* is necessary when a State seeks to tax the instrumentalities of foreign, rather than of interstate, commerce. In addition to answering the nexus, apportionment, and non-discrimination questions posed in *Complete Auto*, a court must also inquire, first, whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation, and second, whether the tax prevents the Federal Government from 'speaking with one voice' when regulating commercial relations with foreign governments."

The first requirement is not a concern in the present case because there has been no de facto showing of multiple taxation, and, as the court stated in *Moorman Manufacturing v. Bair*, 437 U.S. 267 (1978), the court will not invalidate a statute where the risk of multiple taxation is merely "speculative." It is the second requirement which concerns the court in the present case. It is not overlooked that in *Japan Line* the tax was an ad valorem levy on certain containers used in seagoing vessels of Japan, whereas in this case the tax is upon the

withdrawing of expendable fuel from storage. However, the principle of both seems applicable. The levy on the fuel, which is a sine qua non to movement of the aircraft, seems to be within the class of burdens which the international agreements seek to prevent.

The United States, consisting of fifty individual state governments united under one flag, must present a united front when dealing in economic affairs with other nations. Over the years the federal government has negotiated these bilateral agreements to prevent price discrimination toward U.S. carriers in other nations, these being reciprocal agreements. There have been continuing efforts of the Civil Aeronautics Board to eliminate fuel taxes imposed by other nations.[4] Also, in 1974 Congress enacted the International Air Transportation Fair Competitive Practices Act, 88 Stat. 2102, to protect U.S. carriers from discrimination. By allowing the fifty states to impose individual state taxes, it would thwart the purpose of these federal efforts and infringe on the federal power to regulate foreign commerce.

Concern for Florida's fuel tax was expressed by the United States Department of State in a letter to the Florida Department of Revenue on September 29, 1982 from Matthew V. Scocozza, Deputy Asssistant Secretary of State for Transportation and Telecommunication. This letter stated that the United States afforded an exemption from federal taxes and this if individual states imposed taxes it would "frustrate the international system of reciprocal tax exemptions and thereby significantly increase the cost of international air transportation. After reassurances from the Florida DOR in their letter of October 25, 1982, that airlines continued to enjoy "generous tax advantages", Senate Bill 8-A was enacted. The Department of State reacted by sending their letter of March 17, 1982 (date is a typographical error and should read "1983") that the Department was "surprised and distressed" to hear

---

[4] Civil Aeronautics Board ("CAB"), Fiscal Year ("FY") 1982/1981 Report to Congress at 94-96; CAB, FY 1980 Report to Congress at 84; CAB, FY 1979 Report to Congress at 103; CAB, FY 1978 Report to Congress at 96; CAB, FY 1977 and Transition Quarter Report to Congress at 106-109, 114-115; CAB, FY 1976 Report to Congress at 103-104.

of the changes in the Florida fuel tax as applied to airlines. Mr. Scocozza's first letter spoke of a "generally-accepted and long-standing international practice of reciprocally exempting such items from taxes".

In *Japan Line* at page 448 the Court talks of state taxes in reference to the second "national-uniformity" requirement:

> "a state tax on the instrumentalities of foreign commerce may impair federal uniformity in an area where federal uniformity is essential. Foreign commerce is pre-eminently a matter of national concern."

At page 449 of *Japan Line* the Court cites *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976) as follows:

> "the Federal Government must speak with one voice when regulating commercial relations with foreign governments."

The *Japan Line* court then discusses several ways a state tax may "frustrate the achievements of federal uniformity," page 450. Among these concerns are asymmetry in international tax structure and retaliatory taxes against American-owned instrumentalities present in other nations:

> "Such retaliation of necessity would be directed at American Transportation equipment in general, not just that of the taxing State, so that the Nation as a whole would suffer." Page 430.

ACCORDINGLY, IT IS FURTHER ORDERED AND ADJUDGED:

A. This Court finds and determines that Chapter 83-3, Laws of Florida, also referred to as Senate Bill 8-A, is a valid enactment and is not in conflict with the Equal Protection clauses of the United States Constitution (14th Amendment) nor the Florida Constitution (Article I, Section 2); nor with the Commerce Clause of the United States Constitution (Article I, Section 8, Clause 3) for the reasons stated in *Delta Air Lines, Inc. v. State of Florida, Department of Revenue*, Case No. 83-761 (Leon County Circuit Court—Civil Division, May 23, 1983).

B. It is further found that Senate Bill 8-A is inconsistent with the undertakings of the United States Government in international bilateral agreements with Plaintiff and Intervenor foreign airlines.

C. Plaintiff's Counts I, II, IV, and V are hereby dismissed finally.

D. Plaintiff and Intervenors are granted a permanent injunction against Defendant DOR assessing and collecting fuel taxes pursuant to Senate Bill 8-A. Count II of Plaintiff's Complaint is meritorious.

E. This court upholds the constitutionality of Senate Bill 8-A, but recognizes an exemption from the fuel tax for Plaintiff and Intervenor foreign airlines who have entered executive agreements with the United States prior to the enactment of this Bill.

DONE AND ORDERED, at Tallahassee, Leon County, Florida, this 1st day of June, 1983.

Ben C. Willis
Circuit Judge

Copies to:
Larry Levy, Esquire
N. Fraser Schuh, III, Esquire

United States Department of State
Washington, D.C. 20520

September 29, 1982

Mr. Randy Miller
Director
Department of Revenue
102 Carlton Building
Calhoun Street
Tallahassee, Florida 32301

Dear Mr. Miller:

The Department of State is seeking your cooperation in an important matter affecting U.S. international aviation relations.

The U.S. Government exempts foreign airlines from customs duties, taxes, fees and other national charges on their aircraft, fuel, and aviation related materials. These exemptions include such items as lubricants, consumable technical supplies, spare parts (including engines) and aircraft stores (including food, beverages and tobacco). The United States obligation to accord these exemptions stems from our adherence to Article 24 of the International Convention on Civil Aviation (Chicago, 1944) and to the air transport agreements which the United States has with over 70 foreign countries. In some cases, such as the absense of a bilateral aviation agreement, exemptions are accorded foreign airlines pursuant to a finding of reciprocity.

Governments of a number of countries have recently brought to our attention that their airlines are required to pay state and local taxes on items for which the U.S. Government grants an exemption from federal taxes. Some foreign governments have questioned the appropriateness of imposing these state and local taxes on foreign air carriers in view of the generally-accepted and long-standing international practice of reciprocally exempting such items from taxes. A few such governments have raised the possibility that state and local authorities in their jurisdictions could impose similar taxes on U.S. airlines. A proliferation of state and local taxes would

frustrate the international system of reciprocal tax exemptions and thereby significantly increase the cost of international air transportation.

We urge therefore, that you exempt foreign air carriers from taxes levied in your jurisdiction on items for which the U.S. Government provides an exemption. To ensure that U.S. airlines enjoy reciprocal treatment abroad, we recommend that you grant such exemptions only to foreign airlines which demonstrate that state and local authorities in their country exempt U.S. airlines from taxes.

In order to respond to foreign government inquiries, we would appreciate knowing precisely what state and local charges you currently levy on foreign airlines. Such information would be particularly helpful if you would indicate whether the charges are indeed taxes or whether they are fees for services rendered. Information concerning actual and proposed exemptions for foreign airlines would also be useful.

We appreciate your assistance and cooperation in this matter.

Sincerely,

Matthew V. Scocozza
Deputy Assistant Secretary for Transportation
and Telecommunication

cc.

Mr. Grover C. Jones
Chief, Bureau of Aviation
Florida Dept. of Transportation
605 Suwannee St.
Mail Station 46
Tallahassee, Florida 32301

Mr. Richard Judy
Director
Miami International Airport
Box 59-2075, AMF Miami, Florida

The Ministry of Foreign Affairs presents its compliments to the Embassy of the United States of America and has the honour to refer to the Air Transport Agreement between the Government of Jamaica and the Government of the United States of America, signed at Kingston, Jamaica, on October 2, 1969, and to the Protocol relating thereto, signed at Kingston, on April 4, 1979.

The Ministry of Foreign Affairs wishes to refer in particular to Article 5(1) (2) (5) and Article 10 (6) of the Protocol which state:

> "5(1) Each Party shall allow a fair and equal opportunity for the designated airlines of both Parties to compete in providing the international air transportation services covered by the Agreement and this Protocol.
>
> "(2) Each Party shall take into consideration the interests of the other Party in its designated airlines so as not to affect unduly the opportunity for the airlines of each Party to offer the services covered by the Agreement and this Protocol.
>
> "(5) Each Party shall take all appropriate action within its jurisdiction to eliminate all forms of discrimination or unfair competitive practices affecting the airlines of the other Party.
>
> "10 (6) Each Party shall use its best efforts to secure for the designated airlines of the other Party, on the basis of reciprocity, an exemption from taxes, duties, charges and fees imposed by State, regional and local authorities on the items specified in paragraph A of Article 8 of the Agreement, as well as from fuel through put charges, in the circumstances described in Article 8 of the Agreement, except to the extent that the charges are based on the actual cost of providing the service."

The State of Florida has introduced, with effect from April 1, 1983, a tax on aviation fuel which will place considerable burden on the designated airline of Jamaica. The tax discriminates against airlines which do not maintain their home office in Florida, and, therefore, discriminates against the designated airline of Jamaica.

The tax is in breach of the Protocol as stated in Article 5 (1) (2) and (5) quoted above. The Government of Jamaica is requesting that the Government of the United States of America take steps to comply with the provisions of the Protocol and to secure exemption from the tax for the designated airline of Jamaica.

The Ministry of Foreign Affairs avails itself of this opportunity to renew to the Embassy of the United States of America the assurances of its highest consideration.

Embassy of the United States of America
Kingston, Jamaica
September 17, 1984

cc.
Jamaican Ambassador—Washington
Attn. Mr. B.G. Henry
Permanent Secretary
Ministry of Public Utilities & Transport

Office-Supreme Court, U.S.
FILED
FEB 4 1985
ALEXANDER L. STEVAS,
CLERK

CASE NO. 84-1041

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1984

AIR JAMAICA LIMITED, a foreign corporation, et al.,

Appellants,

vs.

STATE OF FLORIDA, DEPARTMENT OF REVENUE,

Appellee.

ON APPEAL FROM THE
SUPREME COURT OF FLORIDA

MOTION TO DISMISS OR AFFIRM

LARRY E. LEVY
P. O. Box 10583
Tallahassee,
Florida 32302
(904) 224-1215

Counsel of Record
for Appellee

JIM SMITH
Attorney General

JOSEPH C. MELLICHAMP, III, Assistant Attorney General
The Capitol
Tallahassee, Fl.
(904) 487-2142

Attorneys for Appellee, State of Florida, Department of Revenue

TABLE OF CONTENTS

	PAGE
Table of Authorities	iii
Motion to Dismiss or Affirm	1
Statement	2
POINTS I & II	12

POINT I. THIS APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION BECAUSE ALL ISSUES RAISED BY THE APPELLANTS HAVE BEEN FORECLOSED BY PRIOR DECISIONS OF THIS COURT.

POINT II. THE DECISION OF THE SUPREME COURT OF FLORIDA IS CONSISTENT WITH PRIOR DECISIONS OF THIS COURT ON THE INVOLVED ISSUES OF LAW, MANY OF WHICH ARE CITED IN THE SUPREME COURT'S DECISION, AND IT IS MANIFEST THAT THE QUESTIONS ON WHICH THE DECISION IN THIS CAUSE DEPENDS, ARE SO INSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT.

A. THE FLORIDA SUPREME COURT'S DECISION IS CONSISTENT WITH THIS COURT'S DECISION IN JAPAN LINE LTD. V. COUNTY OF LOS ANGELES, 441 U.S. 434 (1979).

PAGE

B. NONE OF THE AIR TRANSPORT INTERNATIONAL AGREEMENTS EXEMPT FOREIGN AIRLINES FROM IMPOSITION OF A STATE EXCISE TAX ON THE PURCHASES OF FUELS IN A STATE OF THE UNITED STATES. 28

C. CHAPTER 212, FLORIDA STATUTES, AS AMENDED BY CHAPTER 83-3, LAWS OF FLORIDA, DOES NOT INVIDIOUSLY DISCRIMINATE AGAINST THE APPELLANTS AND IS NOT IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION.

Conclusion 45

TABLE OF AUTHORITIES

	PAGE
CASES	
Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522 (1959)	42
Carmichael v. Southern Coal & Coke Co., 301 U.S. 495 (1937)	41
Commonwealth Edison Co. v. State of Montana, 453 U.S. 609 (1981)	41
Complete Auto Transit v. Brady, 430 U.S. 274 (1977)	18
Container Corp. of America v. Franchise Tax Board, 463 U.S. 159 (1983)	22,23,24, 26,27
Eastern Air Transport, Inc. v. South Carolina Tax Commission, 285 U.S. 147 (1932)	41,42
In re Estate of Ghio, 108 P. 516 (Calif. 1910) aff'd Rocco v. Thompson, 223 U.S. 317 (1912)	15
Florida Revenue Commission v. Maas Brothers, Inc., 226 So.2d 849 (Fla. 1 DCA 1969) cert. den. 237 So.2d 177	3

	PAGE
Gaulden v. Kirk, 47 So.2d 567 (Fla. 1950)	2
Green v. Panama City Housing Authority, 115 So.2d 560 (Fla. 1959)	3
Guarantee Trust Co. v. United States, 304 U.S. 126 (1938)	15,35
Kirk v. Western Contracting Company, 216 So.2d 503 (Fla. 1 DCA 1968) cert. den. 225 So.2d 535, app. dism. 226 So.2d 815	3
Hines v. Davidowitz, 312 U.S. 52 (1941)	16,17,37
Japan Line Ltd. v. County of Los Angeles, 441 U.S. 434 (1979)	12,18,19, 21,22,23, 24,25,27
Madden v. Commonwealth of Kentucky, 309 U.S. 83 (1940)	42
Nashville, Chattanooga & St. Louis Railway v. Wallace, 280 U.S. 249	43
Northeastern International Airways v. Florida Department of Revenue, Case No. 84-921	8

	PAGE
Pennsylvania v. Nelson, 350 U.S. 497 (1956)	36
Republic of Finland v. Town of Pelham, 270 N.Y.S.2d 661	38,39
Ryder Truck Rental v. Bryant, 170 So.2d 822 (Fla.1964)	3
United States v. Pink, 305 U.S. 203 (1942)	16
Estate of W.T. Grant Co. v. Lewis, 358 So.2d 76 (Fla. 1 DCA 1978) 370 So.2d 764 (Fla. 1959)	3
FLORIDA STATUTES	
Ch. 206	3,4,5, 7,8,43
Ch. 207	3,4,5, 7,43
Sec. 207.005(2)	5
Ch. 212	2,3,7 8,9,11, 40
Sec. 212.08(4)	4,5,6, 8
Sec. 212.08(8), (9)	6

PAGE

OTHER

Ch. 83-3, Laws of Fla.	2,4,6, 7,9,11, 29,45
Ch. 80-368, Laws of Fla.	6
Digest of International Law, 9 Whiteman Digest of International Law, 457-58 (1968)	14
Agreement between United States and Jamaica, Oct. 2, 1969, T.I.A.S. 9613	9,10,11
Agreement between United States and Jamaica, Oct. 2, 1969 T.I.A.S. 6770	32
Agreement between United States and Columbia, Oct. 24, 1957 T.I.A.S. 5338	32

MOTION TO DISMISS OR AFFIRM

Appellee moves the Court to dismiss this appeal or to affirm the decision of the Supreme Court of Florida on the following grounds:

I. This appeal does not present a substantial federal question because all issues raised by the Appellants have been foreclosed by prior decisions of this Court.

II. The decision of the Supreme Court of Florida is consistent with prior decisions of this Court on the involved issues of law, many of which are cited in the Supreme Court's decision, and it is manifest that the questions on which the decision in this cause depends, are so insubstantial as not to need further argument.

STATEMENT

This appeal is from a decision of the Florida Supreme Court upholding the constitutionality of Chapter 83-3, Laws of Florida, except for §61, which involved a Florida corporate tax credit, which is unrelated to the Florida Sales Tax Law, Chapter 212, Florida Statutes. Chapter 83-3, supra, amended Chapter 212, Florida Statutes, which is commonly referred to as the "Sales Tax Law of Florida". The statute, Chapter 212, Florida Statutes, has been construed by the Florida Supreme Court and other Florida appellate courts on numerous occasions, as being an excise tax levied on the privilege of engaging in certain businesses and transactions as provided for in the statute. Gaulden v. Kirk, 47 So.2d 567 (Fla. 1950)

Florida Revenue Commission v. Maas Brothers, Inc., 226 So.2d 849 (Fla. 1 DCA 1969); cert. den. 237 So.2d 177; Estate of W. T. Grant Co. v. Lewis, 358 So.2d 76, (Fla.1 DCA 1978); 370 So.2d 764 (Fla.1979); Kirk v. Western Contracting Company, 216 So.2d 503 (Fla. 1 DCA 1968), cert. den. 225 So.2d 535; app. dism. 226 So.2d 815; Ryder Truck Rental v. Bryant, 170 So.2d 822 (Fla. 1964); Green v. Panama City Housing Authority, 115 So.2d 560 (Fla. 1959). The decision in this cause merely restates the position of the highest Court of the State of Florida, to the effect that the excise taxes imposed under Chapter 212, Florida Statutes, are imposed on the privilege of engaging in certain businesses, and are levied on the vendor, for the exercise of such privilege.

Motor fuel and special fuel are taxable under Chapters 212, 206, and 207, Florida Statutes. These several statutes generally interface to some extent because

the Legislature has attempted to utilize the same as part of the body of law of the State of Florida to generate taxes for the operation of government and taxes for public transportation. Prior to April 1, 1983, the effective date of Chapter 83-3, supra, motor fuel and special fuel which were not subject to the 8 cents tax imposed by Chapter 206, Florida Statutes, were taxable under the sales tax law, Chapter 212, Florida Statutes, in the following manner. §212.08(4), F.S., exempted motor fuels and special fuels on which a tax was imposed by Chapter 206 or Chapter 207, Florida Statutes. Aircraft was not within the definitions found in Chapters 206 or 207, Florida Statutes, and accordingly paid no tax under either Chapter 207, Florida Statutes, or Part I or Part II of Chapter

206, Florida Statutes. Truckers, as common carriers, did pay tax under Chapter 207, F.S., and paid tax under Chapter 206, F.S., although a credit was allowed on the taxes paid under Chapter 206, F.S., if tax was paid under Chapter 207, F.S. Truck common carriers were allowed to pro-rate tax under Chapter 207, Florida Statutes. See §207.005(2), F.S.

Since the airlines paid no tax under Chapters 206 or 207, F.S., the exemption found in §212.08(4), F.S., exempting purchases of fuels which had been subjected to tax under Chapters 206 and 207, F.S., did not apply to the airlines. However, airlines did receive pro-ration under §212.08(4), F.S.

Airlines generally lease space and the right to use government owned airport facilities in Florida and at one time were required to pay ad valorem real property taxes on such use and occupancy. However, the Legislature in 1980 enacted Chapter 80-368, Laws of Florida, so as to relieve airlines from the burden of having to pay local ad valorem taxes on such leased property used for airline purposes.

Prior to the effective date of Chapter 83-3, supra, vessels and railroads, like aircraft, were allowed to pro-rate the tax by virtue of the provisions found in Chapter 212, Florida Statutes. See §212.08(4), §212.08(8), and §212.08(9), F.S. However, vessels and railroads were

not exempt from the provisions of Part I of Chapter 206, F.S., on purchases of motor fuel, but were exempt as were aircraft from the provisions of Part II of Chapter 206, F.S., and Chapter 207, F.S., both of which contained taxes on such fuel in a specified amount per gallon. Chapter 83-3, supra, removed from the statute, the authority which allowed airlines to pro-rate taxes. Truck line common carriers were required to pay both the taxes imposed under Chapter 206, F.S., and any which may be due under Chapter 207, F.S., and the new tax imposed in Part II of Chapter 212, Florida Statutes, through the enaction of Chapter 83-3, supra. Vessels and railroads continue to receive the pro-ration found in

§212.08(4), F.S., but also continue to be liable for taxes imposed under Part I of Chapter 206, F.S.

Although Appellant argues strenuously that the tax imposed under Chapter 212, Florida Statutes, is a user fee or user tax, this contention was rejected by the Trial Court both factually and legally. Although the Appellee does not agree that such question is a factual issue, and in fact, in another case pending on appeal involving the same statute,[1] no testimony was taken. Even if such were a factual issue, it has been resolved against

---

[1]Northeastern International Airways, v. The Florida Department of Revenue, Case No. 84-921.

the Appellant, by the Trial Court which is the trier of fact, and affirmed by the Florida Supreme Court.

That part of the Appellant's argument premised in part on the false assumption that the taxes imposed under Chapter 212, Florida Statutes, are user fees is ill-founded. This is not, and never has been true.

It is significant that all foreign air carriers and all United States air carriers purchasing fuel in the United States were subjected to taxes in exactly the same manner both before and after the enaction of Chapter 83-3, Laws of Florida.

The various international agreements involved in the case at bar contain an article similar to that found in the agreement between the United States and Jamaica, dated October 2, 1969, T.I.A.S. 9613:

> Each party shall allow a fair and equal opportunity for the designated airlines of both Parties to compete in providing the international air transportation services covered by the agreement and this protocol.

Article V (1). Also see Article V(5) which provides:

> Each party shall take all appropriate action within its jurisdiction to eliminate all forms of discrimination or unfair competitive practices affecting the airlines of the other party. Similar provisions are found in the other agreements.

Article VIII of the agreement between the United States and Jamaica, October 2, 1969, provides in part:

> Each Contracting Party shall exempt the designated airline or airlines of the other Contracting Party to the fullest extent possible under its national law, on the basis of reciprocity, from import restrictions, customs duties, excise taxes, inspection fees, and other national duties and charges on fuel, lubricants, consumable technical sup-

> plies, spare parts including engines, regular equipment, ground equipment, stores, and other items intended for use solely in connection with the operation or servicing of aircraft of the airlines of such other Contracting Party engaged in international air service. (e.s.)

This is different from the clause in the agreement speaking to state taxes, which provides:

> "(6) Each party shall use its best efforts to secure for the designated airlines of the other party, on the basis of reciprocity, an exemption from taxes, duties, charges and fees imposed by state, regional, and local authorities on the items specified in paragraph A of Article 8 of the agreement, as well as from fuel-put charges . . ."

Air Transport Service Agreement between the United States of America and Jamaica, April 4, 1979, T.I.A.S. 9613.

No specific exemption is provided in any of the agreements for state excise taxes such as that imposed under Chapter 212, Florida Statutes, as amended by Chapter 83-3, Laws of Florida.

POINTS I AND II

POINT I. THIS APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION BECAUSE ALL ISSUES RAISED BY THE APPELLANTS HAVE BEEN FORECLOSED BY PRIOR DECISIONS OF THIS COURT.

POINT II. THE DECISION OF THE SUPREME COURT OF FLORIDA IS CONSISTENT WITH PRIOR DECISIONS OF THIS COURT ON THE INVOLVED ISSUES OF LAW, MANY OF WHICH ARE CITED IN THE SUPREME COURT'S DECISION, AND IT IS MANIFEST THAT THE QUESTIONS ON WHICH THE DECISION IN THIS CAUSE DEPENDS, ARE SO INSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT.

A. THE FLORIDA SUPREME COURT'S DECISION IS CONSISTENT WITH THIS COURT'S DECISION IN JAPAN LINE LTD. V. COUNTY OF LOS ANGELES, 441 U.S. 434 (1979).

It should be remembered that the exemption sought by foreign airlines is inconsistent with the Articles in the

various agreements which provide that each party shall allow a fair and equal opportunity for the designated airlines of both parties to compete in the international air transportation covered by the agreements. That which is sought by the Appellant destroys competitive equality because it would provide an exemption from state taxation to foreign airlines purchasing fuel in the United States, which such exemption is not permitted to United States domestic airlines purchasing fuel in Florida traveling and competing on the same routes as the foreign airlines. The effect of this is to have Florida and the United States subsidizing foreign airlines in competition with the domestic airlines.

This purpose is totally inconsistent with the terms of the agreements themselves which provide in effect that there shall be a fair and equal opportunity for the airlines of each party to operate on any route listed in the agreement and that the parties shall provide a fair and equal opportunity to compete for traffic on a nondiscriminatory basis. (See Agreements) So that which is sought by the foreign airlines is a competitive advantage, not equality of treatment in competition.

The fair and equal opportunity provisions found in the various agreements speak only to routes and not to taxes. By their terms, these clauses guarantee the fair and equal opportunity to operate over the designated routes. The State Department's official Digest of International Law, 9 Whiteman Digest of International Law, 457-58 (1968) suggests that the goal of these provisions was to avoid subsidization of one airline more than another so

that one carrier could give the same service at a lower rate. However, even assuming that the fair and equal opportunity to operate provisions do relate to taxes, it is obvious that Florida's excise tax levied on the sale of fuel in the State of Florida, is consistent with these international agreement provisions because it taxes foreign airlines and domestic airlines identically. This Court has recognized that the language of a Treaty wherever reasonably possible will be construed so as not to override state laws or to impair rights arising under them. Guarantee Trust Co v. United States, 304 U.S. 126 (1938) In re Estate of Ghio, 108 P. 516 (Calif. 1910), aff'd; Rocco v. Thompson, 223 U.S. 317 (1912) in which

the Court stated that:

> "Such intent is not to be lightly imputed to the federal government, and that it cannot be allowed to exist except where the language used in a treaty plainly expresses it, or necessarily implies it.

It has also been recognized that even treaties with foreign nations will be carefully construed so as not to derogate from the authority and states of this nation unless clearly necessary to effectuate the national policy. United States v. Pink, 305 U.S. 203 (1942).

In Hines v. Davidowitz, 312 U.S. 52 (1941), this Court discussed state laws which were conflicting, contrary to, or repugnant to federal law in the context of a state law dealing with regulation of aliens, which it was conceded was a matter

exclusively within the Federal Government's jurisdiction. This Court pointed out, however, that concurrent state laws could not be enacted dealing with the same general subject, but distinguished that fact situation from the situation where the states' sovereign power to tax was involved and stated:

> Any concurrent state power that may exist is restricted to the narrowest of limits; the state's power here is not bottomed on the same broad base as is its power to tax. And it is also of importance that this legislation deals with the rights, liberties, and personal freedoms of human beings, and is in an entirely different category from state tax statutes or state pure food laws regulating the labels on cans.

312 U.S. at page 58.

The footnote found therein is also significant. It provides:

> Express recognition of the breadth of the concurrent taxing power of state and nation is found in Federalist paper No. 32.

With this general understanding of certain provisions found in the agreements and of

the general power of states to tax absent express and clear restriction by the federal government, Appellants' contention that the Supreme Court's decision is inconsistent with Japan Line Ltd. will be considered.

In Japan Line Ltd., this Court set forth two additional requirements to the "four prong" test referred to in Complete Auto Transit v. Brady, 430 U.S. 274 (1977). The first was whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation, and second whether the tax prevents the federal government from "speaking with one voice when regulating commercial regulations with foreign governments." The decision of the

Florida Supreme Court is consistent with the Japan Line Ltd. and meets both of the additional tests. First, since the legal incident of the withdrawal from storage for use can occur only once, that legal incident could not be taxed in any foreign country. This situation is totally different from the factual situation before this Court in Japan Line Ltd., because in that case, the containers being taxed were taxed because of their physical location in California, even though such physical location was of a temporary nature. The containers were used to transport merchandise and could be compared to vessels used for the transportation of property from a foreign country to the United States. The

containers had entered the United States pursuant to a "Customs Convention on containers" agreement which granted containers temporary admission free of import duties and import taxes and free of import prohibitions and restrictions provided they are used solely in foreign commerce and are subject to re-exportation. The containers were designated "instruments of international traffic." Since the containers were capable of physical relocation, and in fact were physically relocated periodically as instrumentalities transporting property in foreign commerce, such containers could physically be located in some other country, and since the tax imposed was a personal property tax which turned on the

situs of the personal property, it is readily apparent that multiple taxation could easily occur. Thus the tax imposed in Japan Line Ltd. was a state tax on instrumentalities of foreign commerce, which is totally unlike the tax imposed in the case at bar, which is an excise tax imposed on dealers for the privilege of engaging in the business of selling fuel in the United States whose legal incident is on the withdrawal from storage for use. This can only occur once, and that is in the State of Florida. Furthermore, in Japan Line Ltd., it was established that Japan has the right and the power to tax the containers in full, and in fact did tax such containers under the property tax

law in Japan. So, because the legal incident giving rise to the tax was physical situs, multiple taxation in fact did occur.

Appellants' suggestion that a risk of double taxation is sufficient to invalidate the tax simply is not supported by Japan Line Ltd. Furthermore, Appellants' speculation that after the airplane lands in a foreign country, the foreign country may impose a tax on whatever fuel is left in the tanks of the aircraft upon landing is exactly that; pure speculation. Furthermore, the State of Florida does not attempt to tax any fuel retained on board the airlines upon arrival into the State of Florida. Thus, the multiple taxation in fact which existed in Japan Line Ltd. is not present in the case at bar. Thus, the Florida Supreme Court's decision is consistent with this Court's pronouncement in Japan Line Ltd. in this regard.

Japan Line Ltd. was discussed by this Court in Container Corp. of America v.

Franchise Tax Board, 463 U.S. 159 (1983). In discussing Japan Line Ltd., this Court pointed out that in that case California had levied an apportioned, non-discriminatory, ad valorem property tax on cargo containers which were instrumentalities of foreign commerce and which were temporarily located in various ports. This Court pointed out that the same cargo containers were subject to an unapportioned property tax in their home port of Japan. It also recognized that an agreement signed by the United States and Japan made clear at least that neither national government could impose a tax on temporarily imported cargo containers whose home port was in the other nation. This Court emphasized that the tax

fell on an instrumentality of commerce, which was temporarily domiciled abroad; that is, the containers themselves. This Court in Container Corp. then stated that " . . . on the basis of the facts in Japan Line, we concluded that the California tax at issue was constitutionally proper . . ."

This Court in Container then distinguished the situation in Container from that in Japan Line by pointing out (1) that it involves a tax on income rather than a tax on property, (2) the reasons for allocation to a single situs that often apply in the case of property taxation carry little force in the case of income taxation; (3) double taxation in the Container Corp. case, although real, was not the "inevit-

able" result of the California taxing scheme. This Court pointed out that in Japan Line, it had relied strongly on the fact that one taxing jurisdiction claimed the right to tax the container in full and another taxing jurisdiction claimed the right to tax the container in part, which was a combination resulting necessarily in double taxation. Furthermore, this Court recognized that the terms of the treaties involved in Container Corp. did not include taxing activities of sub-national governmental units such as states, stating:

> Third, none of the tax treaties into which the United States has entered covers the taxing activities of sub-national units such as states.

It pointed out that the Senate had on at least one occasion, in considering a proposed treaty, declined to give its consent to a provision in the treaty so as to include a restriction on state taxation.

This is significant because the agreements involved in this case do not cover the taxing activities of sub-national units such as states. Thus, the Florida Supreme Court's decision is consistent with this Court's decision in Container Corp. because it too recognized that the agreement relied upon as a basis for avoiding state taxation only spoke to national taxes and not state taxes. Thus, this Court upheld the imposition of the California income tax distinguishing that situation from the situation involving the property tax on containers involved in Japan Line.

Florida's tax is an excise tax imposed on Florida dealers for the privilege of engaging in the business of selling fuel, not a property tax. This privilege is exercised solely within the State of

Florida and applies to all airlines, foreign and domestic, purchasing fuel in the State of Florida. The legal incidence of levy is the first withdrawal for use, and this can occur only once. Florida is not attempting to tax fuel brought into the United States aboard foreign airlines coming into Florida. Since this legal incident can occur only once, no multiple taxation in fact could exist. This is totally dissimilar from the situation in Japan Line where the containers were subject to both property tax in California and an unapportioned like tax in Japan. Thus, the Florida Court's decision is consistent with this Court's decisions in Container Corp. and Japan

Line.

B. NONE OF THE AIR TRANSPORT INTERNATIONAL AGREEMENTS EXEMPT FOREIGN AIRLINES FROM IMPOSITION OF A STATE EXCISE TAX ON THE PURCHASES OF FUELS IN A STATE OF THE UNITED STATES.

Appellants apparently acknowledge that none of the agreements provide for the specific exemption which they seek but nevertheless suggest that somehow Florida's excise tax prevents the United States from speaking with one voice. The United States has spoken and has not chosen to exempt foreign airlines from state excise taxes imposed on purchases of fuel in any state in the United States. One reason for this is obvious. The purpose of all of the international agreements is to ensure competitive equality. If the United States

had exempted foreign airlines from imposition of state excise taxes, this could mean that the state would still impose taxes on sales to domestic airlines on such purchases of fuel, but could not collect a similar tax on sales to foreign airlines competing with the domestic airlines over the same routes. This would destroy the competitive equality demanded by the agreements and would leave the United States in the position of subsidizing foreign airlines at the expense of the domestic carriers. Furthermore, prior to April 1, 1983, when Chapter 83-3, Laws of Florida, was enacted, foreign airlines and domestic airlines paid the excise tax imposed on fuel sold in Florida, and such tax was

apportioned. If the agreements exempted foreign airlines from the purchases of fuel since the inception, (the 1940's) then why were the foreign airlines paying the tax prior to April 1, 1983?

The Appellants attempt to rewrite the agreements to provide for a specific exemption from state taxation. None of the agreements contain such an exemption so the statement made by Appellants that the Florida Supreme Court ignored the terms of the agreement is totally without basis. The Florida Supreme Court did not ignore the terms of the agreement and in fact examined same and recognized that no specific exemption from state excise taxes was provided for in such agreements.

By limiting the self-executing provisions pertaining to taxes in the agreements to only national taxes and duties, the Executive Branch has indicated an intent not to invade the state's power to tax (some agreements do not even speak to any taxation). Federal preemption of state taxation should never be implied nor inferred, so the absence of any specific preemption of the state's power to tax would certainly suggest that no intent existed to invade the state's taxing power. The various agreements generally contain a clause similar to that found in the agreement between the United States and Jamaica which provides as follows:

> Each party shall use its best efforts to secure for the designated airlines of the other Party, on the basis of reciprocity, an exemption from taxes, duties, charges and fees imposed by State, regional and local authorities on the items specified in paragraphs A of Article 8 of the agreement, as well as from fuel through-put chargers, ... Art. 10(6), Air Transport Service Agreement between the United States of America and Jamaica, October 2, 1969, T.I.A.S. 6770.

This Clause is obviously non self-executing. It should be compared with Article VII D, of the Agreement dated October 24, 1956, T.I.A.S. 5338, between the United States and Columbia, which speaks to exemption from national duties and charges on fuel. It mandates that each contracting party shall exempt, which is totally dissimilar from language which states that each party shall use its best efforts to secure an exemption from taxes imposed by a state. Appellants would prefer to ignore such a distinction.

The Supreme Court squarely recognized the difference in the substance of these two provisions found in differing agreements. The one dealing with the exemption from national excise duties and charges, is self-executing, while the one dealing with exemption from state excise taxes is not.

All of the agreements contain certain language which provides that the parties shall allow a fair and equal opportunity to compete for the airlines of both parties.

These clauses deal with routes and discrimination or unfair competitive practices affecting the airlines of the other party and do not specifically address taxes, but even if they did, exemption from taxes on purchase of fuel by foreign airlines where so such exemption is

provided for United States airlines traveling over the same routes, would destroy the purpose of this clause guaranteeing a fair and equal opportunity to compete because it would place the foreign airlines in a position of being subsidized at the expense of the domestic airlines.

Here, the United States has spoken with one voice on the subject of state excise taxes, and recognizing the state's sovereign power to tax, has not preempted such taxing power. The terms of the various agreements are clear to this affect. Any United States action is executory. The language which suggests that the United States would use its best

efforts to secure exemption, falls far short of declaring a national policy of preempting state taxation in the agreements.

The language of a treaty wherever reasonably possible will be construed so as not to override state laws or to impair rights arising under them. Guarantee Trust Co. v. United States, 304 U.S. 126 (1938). Clearer executory language and intent could scarcely be found than that found in the various international agreement provisions relied upon by the Appellants.

This type language is little more than an agreement to attempt to obtain future action from the states. The Florida Supreme Court recognized that the provision in the agreement dealing with national duties and excise taxes applied only to national custom duties and excise taxes and charges. The Florida Supreme Court

recognized that the purpose of the agreement was to preserve and promote the continued development of a system of air transport free from discriminatory practices and to support equal commercial opportunity between the nations. It pointed out that the competitive equality would be destroyed if the United States air carriers had to pay state excise taxes on fuel purchases and the foreign carriers did not. In doing so, the Florida Supreme Court relied upon this Court's decision in Pennsylvania v. Nelson, 350 U.S. 497 (1956) and applied the three-prong test to determine the supremacy of a federal regulatory scheme over the state regulation in the same or similar area. Thus, the Florida Supreme Court's decision is consistent with (1) the language of the various agreements themselves, and (2) this Court's application of the three-prong test in Nelson.

Any examination of federal restriction on state taxing power must be viewed in light of this Court's statement in Hines v. Davidowitz, 312 U.S. 52 (1941). That case discussed the concurrent powers of the state and recognized that the state's power to tax was bottomed on a much broader base than that being considered in Hines. The case at bar is not a situation where federal preemption exists because the agreements themselves recognize the difference between national taxes and state taxes; exemption is provided from national taxes by the terms of the agreement in clear, concise terms, while state excise taxes are discussed in terms of future endeavors, which may or may not come to

pass. An agreement to try to agree is not a contract. The agreement could just as easily have provided that the foreign governments shall use their best efforts to prevent United States aircraft from being hijacked or attacked while on the ground in the foreign country. Such is not a binding contract. The Executive Branch of the Federal Government has spoken differently with regard to national and state taxation. Appellants' are asking this Court to ignore this difference which is tantamount to asking this Court to amend or rewrite the agreements to include such an exemption.

An example of a treaty which does provide exemption from local taxes is found in the case of Republic of Finland v. Town of Pelham, 270 N.Y.S.2d. 661. Article 21 of the treaty in that case provided in

> "Lands and buildings situated in the territory of either High Contracting Party, of which the other High Contracting Party is the legal or equitable owner and which are used exclusively for governmental purposes by that owner, shall be exempt from taxation of every kind, National, State, Provincial and Municipal, other than assessments levied for services or local public improvements by which the premises are benefited." (49 U.S. Stat.2675) (e.s.)

Accordingly, the federal questions presented are plainly insubstantial and it is manifest that the questions on which the decision in this Cause depends are so insubstantial as not to need further argument.

C. CHAPTER 212, FLORIDA STATUTES, AS AMENDED BY CHAPTER 83-3, LAWS OF FLORIDA, DOES NOT INVIDIOUSLY DISCRIMINATE AGAINST THE APPELLANTS AND IS NOT IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION.

The Appellants suggest that the statute is unconstitutional because the tax is imposed at a predetermined price of $1.148 per gallon while the price actually paid by airlines at the time of trial was 90 cents per gallon. Appellant also contends that there is no rational basis for disallowing pro-ration of the tax to airlines while allowing same to vessels and railroads.

With regard to the rate of taxation, this Court has on numerous occasions held that the rate of a state taxation was a matter peculiarly within the province of the legislative branch of government and was not subject to judicial inquiry. In

Commonwealth Edison Co. v. State of Montana, 453 U.S. 609 (1981); Carmichael v. Southern Coal & Coke Co., 301 U.S. 495 (1937); and Eastern Air Transport, Inc., v. South Carolina Tax Commission, 285 U.S. 147 (1932). The state could just as easily have imposed the tax at a fixed amount per gallon regardless of the price paid per gallon. The tax is collected on the first transfer or first withdrawal from storage, which means that the tax is generally collected from either distributors or wholesalers. At that point in time there is no way that the distributor or wholesaler can know what the ultimate retail price may be. Thus, the state has determined as a matter of convenience and necessity to fix the price based on the predetermined price per gallon, but the state could just as easily have imposed it on a fixed amount per gallon regardless of the price.

Either way the result could have been the same. In fact, in Eastern Air Transport, the tax which was upheld by this Court imposed the license tax there involved on the sale of fuel at the fixed price of 6 cents per gallon.

With regard to Appellants' contention that the tax imposed should be pro-rated based on miles traveled in Florida, this type contention, too, has been rejected by this Court on numerous occasions. This Court has held that in matters of taxation the states have the widest latitude with regard to classification. Allied Stores of Ohio, Inc., v. Bowers, 358 U.S. 522 (1959); Madden v. Commonwealth of Kentucky, 309 U.S. 83 (1940). In fact, although other type common carriers are permitted to pro-rate, the Supreme Court pointed out the difficulty that the state had experienced

in the past with permitting airlines to pro-rate, discussing the fact that the airlines could effectively avoid the accumulation of intrastate travel by flying over the Atlantic Ocean and the Gulf of Mexico. Furthermore, other common carriers pay gasoline taxes under Chapters 206 and 207, Florida Statutes, while airlines do not. The Appellants are arguing precisely what was rejected by this Court in the case of Nashville, Chattanooga & St. Louis Railway v. Wallace, 280 U.S. 249. In that case, this Court held that common carriers by railroad and common carriers by motor vehicles constituted different classes of occupations which the state was not required to tax in the same manner or equally. In that case, this Court also rejected the contention that the tax

violated the Commerce and Fourteenth Amendment Clause because a heavier burden of taxation was imposed upon railroads and upon common carriers by motorbus, and the suggestion that the tax was invalid because it was used for highway construction and the railroads did not use the highways. The Florida Supreme Court reached a similar conclusion pointing out that flight travel is not complete upon arrival at the airports. Persons and property need roads for transportation to the airports.

It should be pointed out that Appellants have included in their brief a letter dated September 17, 1984, addressed to no one and signed by no one. This is improper because this letter was not a part of the record below and apparently written to be self-serving over a year after the case was argued in the Florida Supreme Court and

about three months after the decision was rendered by the Florida Supreme Court. Furthermore, the complaint that the tax discriminated against airlines which do not maintain their home office in Florida is addressed in §61 of Chapter 83-3, supra, which was invalidated by the Florida Supreme Court and which has not been appealed by the State.

CONCLUSION

For all of the above and foregoing reasons, the Appellee urges the Court to grant its Motion to Dismiss the appeal or to affirm the decision of the Supreme Court of Florida, because this appeal does not present a substantial federal question inasmuch as the decision of the Supreme

Court of Florida is consistent with prior decisions of this Court, and it is manifest that the questions on which the decision in this cause depends are so insubstantial as not to need further argument.

Respectfully submitted,

LARRY E. LEVY
P.O. Box 10583
Tallahassee
Florida 32302
(904) 224-1215

JIM SMITH
Attorney General

JOSEPH C. MELLICHAMP, III
Assistant Attorney
General
The Capitol
Tallahassee, FL 32301
(904) 487-2142

Attorneys for
Appellee, State of
Florida, Department
of Revenue

PROOF OF SERVICE

I, LARRY E. LEVY, depose and say that I am Counsel of Record for Appellee, State of Florida, Department of Revenue, and that on February 2, 1985, I served a copy of the foregoing Motion to Dismiss or Affirm on each of the parties required to be served herein as follows:

On Appellants, AIR JAMAICA LIMITED, et al., by mailing copies in duly addressed envelopes, with first class postage prepaid, to J.C. O'Steen and Thomas W. Lager, Lager, Woodward & O'Steen, 320 West Park Avenue, Tallahassee, Florida 32301; Jerry M. Dale, 8370 West Flagler, Miami, Florida 33144; and Morton H. Silver, P. O. Box 522965, Miami, Florida 33152.

All parties required to be served have been served.

LARRY E. LEVY
P. O. Box 10583
Tallahassee, Florida 32302
(904) 224-1215

Counsel of Record
for Appellee

Office - Supreme Court, U.S.
FILED
MAR 7 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1041

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

AIR JAMAICA LIMITED, *et, al.*,
Appellants,

v.

STATE OF FLORIDA, DEPARTMENT OF REVENUE,
Appellee.

On Appeal from the Supreme Court of the State of Florida

APPELLANTS' REPLY BRIEF

JERRY M. DALE
8370 West Flagler
Miami, Florida 33144
and
MORTON H. SILVER
P.O. Box 522965
Miami, Florida 33152
of Counsel

J.C. O'STEEN
THOMAS W. LAGER
LAGER, WOODWARD & O'STEEN

320 West Park Avenue
Tallahassee, Florida 32301
(904) 222-4848
Counsel for Appellants

INDEX

Page

APPELLANTS' REPLY BRIEF..... 1

TABLE OF AUTHORITIES

Cases Page

Aerovias Interamericanas de Panama, S.A. v. Board of County Commissioners of Dade County, Florida, 197 F. Supp. 230 (S.D. Fla. 1961), rev'd. on other grounds, 307 F.2d 802 (5th Cir. 1962)..... 4

Complete Auto Transit v. Brady, 430 U.S. 274 (1977)..... 4

Japan Line, Ltd. v. County of Los Angeles, 441 *U.S. 434 (1979)* 1,4,5

Diplomatic Notes

Diplomatic Note submitted by the Embassy of El Salvador to the U.S. Department of State (Dec. 3, 1984)..... 3

Diplomatic Note submitted by the Embassy of Jamaica to the U.S. Department of State..... 3

Treaties and other Agreements

Air Transport Services Agreement Between the United States of America and Jamaica, T.I.A.S. No. 6770 3

The American Law Institute's Restatement of Foreign Relations Law of The United States (second) (1965) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1041

AIR JAMAICA LIMITED, *et al.*,
Appellants,

v.

STATE OF FLORIDA, DEPARTMENT OF REVENUE,
Appellee.

On Appeal from the Supreme Court of the State of Florida

APPELLANTS' REPLY BRIEF

Pursuant to Supreme Court Rule 16.5, Air Jamaica Limited and the other foreign airline appellants in this proceeding ("Appellants") submit this reply brief in opposition to the motion of the State of Florida to dismiss this appeal or to affirm the judgment of the court below. The Appellants will address only two points made by the State of Florida: (1) that the Florida tax violates the provisions of the various international agreements and is inconsistent with this Court's decision in *Japan Line Ltd. v. County of Los Angeles,* 441 U.S. 434 (1979).

Appellee in its Motion to Dismiss has stated, ". . . that the exemption sought by foreign airlines is inconsistent with the Articles in the various agreements...." The basis of Appellee's statement is founded on the theory that there will be a destruction of competitive equality between foreign and domestic airlines because the domestic airlines would be taxed on fuel purchases in Florida and foreign airlines would not.

Appellee has totally missed the main purpose of the international agreements. Each international agreement states in material part, "Each contracting party shall exempt the designated airline or airlines of the other contracting party to the fullest extent possible under its national law, on the basis of reciprocity, from . . . ." The issue is exempting foreign airlines in the United States, and domestic airlines in foreign countries, *not* domestic airlines within their own country of domicile. It is the state of Florida that attempts to violate the reciprocal international agreements by taxing foreign airlines that are not permitted by federal law to enter into intra or interstate commerce.

Florida's attempt to invade the federal government's exclusive domain of foreign commerce will have an adverse affect on all domestic carriers no matter what state they depart from.

Florida's attempt at violating the reciprocal international agreements has caused threatened retaliation from some of Appellants' governments. Appellant, Air Jamaica's goverment has expressed concern over the breach of the Protocal between U. S. and Jamaica. Appellants have attached the diplomatic message to its Jurisdictional Statement in the Appendix, page 128, 129. Since the filing of Appellants' Jurisdictional Statement, Appellant, TACA International Airline's government of El Salvador

has transmitted a similar diplomatic message to the U. S. Ambassador for El Salvador.[1]

Appellee attempts to further cloud the issue by stating that material parts of some of the International Agreements of issue are not self-executing. As an example Apellee cites Art. 10(6), Air Transport Service Agreement between the United States of America and Jamaica, October 2, 1969, T.I.A.S. 6770, which states:

> Each party shall use its best effort to secure for the designated airlines of the other Party, on the basis of reciprocity, an exemption from taxes, duties, charges and fees imposed by State, regional and local authorities on the items specified in paragraphs A of Article 8 of the agreement, as well as from fuel through-put charges,. . . .

The key phrase which Appellee ignores is, ". . . on the basis of reciprocity, ..." Reciprocity is the self-executing provision of this article. The American Law Institute's Restatement of Foreign Relations Law of the United States (Second) (1965) gives an illustration explaining §143, Effect on Domestic Law of Executive Agreement Authorized by Act of Congress, as follows:

> 2. Pursuant to an act of Congress authorizing him to make agreements with respect to imports of textiles, the President makes an executive agreement with state A *providing for reciprocal entry* and non-discriminatory treatment of textiles. A

---

[1]Diplomatic note No. 14139 submitted by the Embassy of the Republic of El Savador to the U.S. Department of State (Dec. 3, 1984).

> statute of one of the states of the United States discriminates against textiles from A. *The executive agreement is self-executing* and takes effect as domestic law superseding the discriminatory statute. (emphasis added)

Appellant would also point out that the international agreements that Appellee relies upon contain "most favored nations" clauses in the Articles dealing with exemption from taxes on fuel. In *Aerovios Interamericanas de Panama, S.A. v. Board of County Commissioners of Dade County, Florida,* 197 F. Supp 230 (S.D. Fla. 1961), rev'd on other grounds, 307 F.2d 802 (5th Cir. 1962). Judge Lieb stated at page 247,

> Finally, treaties which contain the so-called "most favored nation" clause are uniformly held to be self-executing.

Finally, Appellee would have this Court believe that the decision of the Florida Supreme Court respecting the foreign airlines is consistent with this Court's decision in *Japan Line Ltd. v. County of Los Angeles,* 441 U.S. 434 (1979). In *Japan Line Ltd.,* this Court set forth two additional requirements to the "four prong" test referred to in *Complete Auto Transit v. Brady,* 430 U.S. 274 (1977). The requirements are whether the tax creates a substantial risk of multiple taxation and whether the tax prevents the federal government from ". . . speaking with one voice when regulating commercial relations with foreign governments."

The cargo containers in *Japan Line Ltd.,* were subjected to a property tax levied in the state of California and taxed

at full value in Japan. Likewise, the issue herein is whether the state of Florida may assess a tax which will create an asymmetry in the international tax structure.

Appellee misses the reasoning of *Japan Line Ltd.* Appellee assumes that the risk of double taxation is that when a foreign airline purchases fuel in the state of Florida, pays the tax at issue, and returns to its home country, the same fuel will be subjected to a tax at the home country. Although this is the fact pattern in *Japan Line Ltd.*, the real danger in the Florida tax is that it will create retaliatory taxes in foreign countries for domestic carriers thereby creating an asymmetry in the international tax structure.

This Court recognized in *Japan Line Ltd.*:

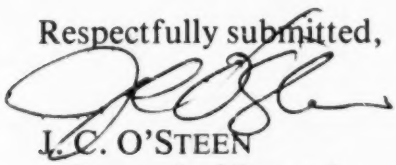
> If a novel state tax creates an asymmetry in the international tax structure, foreign nations disadvantaged by the levy may retaliate against American-owned instrumentalities present in their jurisdictions. Such retaliation of necessity would be directed at American transportation equipment in general, not just that of the taxing state, so that the Nation as a whole would suffer.

The risk of retaliation by Jamaica and other foreign countries as previously referenced, is acute, and of necessity, such retaliation would be felt by the Nation as a whole. If the state of Florida is allowed to fire the first shot in an international tax war, other forms of domestic transportation will be subjected to the retaliatory taxes. The result would be another form of multiple taxation

and would make speaking with one voice impossible. As in *Japan Line Ltd.*, "[Florida] by its unilateral act, cannot be permitted to place, these impediments before this Nation's conduct of its foreign relations and its foreign trade." Likewise, Florida may not tell this Nation or the foreign countries involved how to run their foreign policies.

The motion of the State of Florida should be denied, and probable jurisdiction should be noted.

Respectfully submitted,



J. C. O'STEEN
Counsel of Record

THOMAS W. LAGER
LAGER, WOODWARD & O'STEEN
320 West Park Avenue
Tallahassee, Florida 32301
Telephone: (904) 222-4848

Counsel for Appellants
Air Jamaica Limited, et al.

Supreme Court, U.S.
FILED
SEP 17 1985
JOSEPH F. SPANIOL, JR.
CLERK

(3) (4) (4)

Nos. 84-902, 84-922 and 84-1041

In the Supreme Court of the United States

OCTOBER TERM, 1985

WARDAIR CANADA INC., APPELLANT

v.

FLORIDA DEPARTMENT OF REVENUE

LINEAS AEREAS COSTARRICENSES, S.A., ET AL., APPELLANTS

v.

FLORIDA DEPARTMENT OF REVENUE

AIR JAMAICA LIMITED, ET AL., APPELLANTS

v.

FLORIDA DEPARTMENT OF REVENUE

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

CHARLES FRIED
Acting Solicitor General

ALBERT G. LAUBER, JR.
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ABRAHAM D. SOFAER
Legal Adviser
Department of State
Washington, D.C. 20520

JIM J. MARQUEZ
General Counsel
Department of Transportation
Washington, D.C. 20590

BEST AVAILABLE COPY

103 (P

QUESTION PRESENTED

Whether a Florida sales tax on aviation fuel, as applied to fuel purchased by foreign airlines for use exclusively in international traffic, unconstitutionally impairs the power of the federal government to regulate foreign commerce.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Discussion	9
A. The federal government is committed to a policy of reciprocal tax exemptions for fuel and supplies used by foreign airlines in foreign commerce, and this policy represents the established practice of nations in the aviation field	10
B. A state tax is invalid under the Commerce Clause if it frustrates attainment of federal uniformity on an aspect of foreign commerce as to which federal uniformity is essential, and thus prevents the federal government from speaking with one voice when regulating commercial relations with foreign countries	22
C. Florida's tax on aviation fuel used by foreign airlines exclusively in foreign commerce is inconsistent with express federal policy and established international practice and hence should be invalidated under the Commerce Clause	30
Conclusion	35
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Air Canada, et al. v. *Department of Revenue of the State of Illinois,* No. 85CH-6973 (Cook County Cir. Ct. July 12, 1985)	33
Compleie Auto Transit, Inc. v. *Brady,* 430 U.S. 274	23
Container Corporation v. *Franchise Tax Board,* 463 U.S. 159	26, 27, 28, 29, 31, 32, 33
Eastern Air Transport, Inc. v. *South Carolina Tax Comm'n,* 285 U.S. 147	30, 31
Edelman v. *Boeing Air Transport, Inc.,* 289 U.S. 249	30

Cases–Continued Page

Exxon Corp. v. *Wisconsin Dep't of Revenue*, 447 U.S. 207 27
Japan Line, Ltd. v. *County of Los Angeles*, 441 U.S. 434 ..... *passim*
McGoldrick v. *Gulf Oil Corp.*, 309 U.S. 414 17
Mobil Oil Corp. v. *Commissioner of Taxes of Vermont*, 445 U.S. 425 26
South-Central Timber Development, Inc. v. *Wunnicke*, No. 82-1608 (May 22, 1984) 26
Southern Pacific Co. v. *Arizona*, 325 U.S. 761 25
Tropical Shipping & Construction Co. v. *Askew*, 364 So. 2d 433 5
United Air Lines, Inc. v. *Mahin*, 410 U.S. 623 30

Constitution, treaties, statutes, and regulations:

U.S. Const.:
Art. 1, § 8, Cl. 3:
Commerce Clause 9, 22, 23, 25
Foreign Commerce Clause 6, 8, 9, 31
Interstate Commerce Clause 6
Art. 6, Cl. 2 (Supremacy Clause) 6, 8, 9, 25
Amend. XIV:
Due Process Clause 6
Equal Protection Clause 6
Air Transport Services Agreement, Feb. 11, 1946, United States-United Kingdom, art. 3(2), 60 Stat. 1500 ..... 14, 15
Air Transport Services Agreement, Dec. 27, 1946, United States-Peru, 61 Stat. 2586 *et seq.*:
art. 3(b), 61 Stat. 2587 14
art. 3(c), 61 Stat. 2587 14
Air Transport Service Agreement, Jan. 8, 1947, United States-Ecuador, 61 Stat. 2773 *et seq.*:
art. 3(b), 61 Stat. 2775 ..... 14, 16
art. 3(c), 61 Stat. 2775 14
Air Transport Services Agreement, Oct. 24, 1956, United States-Colombia, 14 U.S.T. 429 *et seq.*:
art. 7, 14 U.S.T. 432 14
art. 7(D), 14 U.S.T. 432 15

Constitution, treaties, statutes, and regulations – Continued: Page

Air Transport Services Agreement, Aug. 15, 1960, United States-Mexico, art. 7, 12 U.S.T. 65 ..... 14, 15
Air Transport Services Agreement, Oct. 2, 1969, United States-Jamaica, art. 8(A), 20 U.S.T. 2966 14
Air Transport Services Agreement, May 8, 1974, United States-Canada, art. XII(1), 25 U.S.T. 794 15
Air Transport Services Agreement, Sept. 22, 1977, United States-Argentina, art. F(3), 29 U.S.T. 2801 ... 16, 19
Air Transport Services Agreement, Apr. 4, 1979, United States-Jamaica, art. 10(6), T.I.A.S. No. 9613 . 17
Air Transport Services Agreement, Apr. 2, 1982, United States-El Salvador, art. 9(5), T.I.A.S. No. 10488 17
Air Transport Services Agreement, Apr. 8, 1982, United States-Barbados, T.I.A.S. No. 10370:
art. 9(2)(a) 15
art. 9(2)(c) 15
art. 9(5) 16
Air Transport Services Agreement, June 23, 1982, United States-Brazil:
art. IX 15
art. IX(4) 19
Air Transport Services Agreement, Oct. 20, 1983, United States-Costa Rica:
art. 9(1) 15
art. 9(2)(a) 15
art. 9(2)(c) 15
art. 9(5) 17
Convention on International Civil Aviation, *opened for signature* Dec. 7, 1944, 61 Stat. 1180 *et seq.* 3, 10, 13
art. 12, 61 Stat. 1183 20
arts. 22-28, 61 Stat. 1186-1188 10
art. 23, 61 Stat. 1186 20
art. 24(a), 61 Stat. 1186 ..... 10, 11, 13, 14
art. 28, 61 Stat. 1188 20
arts. 43-66, 61 Stat. 1192-1200 11
art. 44, 61 Stat. 1193 11
Customs Convention on Containers, May 18, 1956, 20 U.S.T. 301 *et seq.* 25
20 U.S.T. 304 25

Constitution, treaties, statutes, and regulations – Continued: Page

Nonscheduled Air Service Agreement, May 8, 1974, United States-Canada, 25 U.S.T. 788 *et seq.*:
art. XI(3), 25 U.S.T. 794 19
art. XII(1), 25 U.S.T. 794 ..... 14, 19
art. XII(1)(c), 25 U.S.T. 794 15
art. XVI(3), 25 U.S.T. 796 19
15 U.S.C. (1976 ed.) 751 *et seq.* 18
19 U.S.C. 1322(a) 25
19 U.S.C. 1435 16
26 U.S.C. 4221(a)(3) 16
26 U.S.C. 4221(d)(3) 16
26 U.S.C. 4221(e)(1) 16
49 U.S.C. App. 1508(b) 4
49 U.S.C. App. 1509(c) 16
Fla. Stat. Ann.:
§ 212.08(4) (West 1971) 4
§ 212.08(4)(a)(2) (West Supp. 1985) 5
§ 212.62(2) (West Supp. 1985) 4
§ 212.62(3)(c) (West Supp. 1985) 5
1985 Fla. Laws 85-348:
§ 2 5
§ 2 (to be codified at Fla. Stat. § 206.9825) 5
§ 2 (to be codified at Fla. Stat. § 206.9855) 5
§ 3 5
§ 9 5
Ill. Admin. Reg. § 130.2080(c) (1984) 33
Mass. Act of July 1, 1985, ch. 145:
§ 7 (to be codified at Mass. Gen. Laws Ann. ch. 46J, § 10) 33, 34
§ 9 33
19 C.F.R.:
Pt. 4 16
Pt. 6 16

Miscellaneous

Page

Assembly Bill, Cal. Leg., 1985-1986 Reg. Sess. 34

M. Brenner, J. Leet & E. Schott, *Airline Deregulation* (1985) 18

11 Foreign Affairs Manual (Feb. 25, 1985) 18

ICAO's Policies on Taxation in the Field of International Air Transport, ICAO Doc. 8632-C/968 (Nov. 1966) 11,12

U.S. Civil Aeronautics Board, *FY 1976 Report to Congress* (1977) 20, 34

U.S. Civil Aeronautics Board, *FY 1977 Report to Congress* (1978) 20

U.S. Dep't of Energy, *Findings and Views Concerning the Exemption of Kerojet Fuels from the Mandatory Petroleum Allocation and Price Regulation* (1978) ... 19

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-902

WARDAIR CANADA INC., APPELLANT

v.

FLORIDA DEPARTMENT OF REVENUE

No. 84-922

LINEAS AEREAS COSTARRICENSES, S.A., ET AL., APPELLANTS

v.

FLORIDA DEPARTMENT OF REVENUE

No. 84-1041

AIR JAMAICA LIMITED, ET AL., APPELLANTS

v.

FLORIDA DEPARTMENT OF REVENUE

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States.

OPINIONS BELOW

The opinion of the Florida Supreme Court in No. 84-902 (J.S. App. A1-A7) is reported at 455 So. 2d 326. The opinion of the Florida Supreme Court in No. 84-922 (J.S. App. 1a-2a) is unreported. The opinion of the Florida Supreme Court in No. 84-1041 (J.S. App. 28-30) is reported at 455 So. 2d 324. The opinions of the

Leon County Circuit Court (84-902 J.S. App. A21-A24; 84-922 J.S. App. 38a-50a; 84-1041 J.S. App. 31-36) are unreported.

JURISDICTION

The judgment of the Florida Supreme Court was entered in each case on June 14, 1984. Timely motions for rehearing were denied in each case on September 12, 1984 (84-902 J.S. App. A38; 84-922 J.S. App. 71a; 84-1041 J.S. App. 95). Notices of appeal in the Florida Supreme Court were filed respectively on November 15, 1984 (84-902 J.S. App. A39-A41), on November 14, 1984 (84-922 J.S. App. 73a-75a), and on November 28, 1984 (84-1041 J.S. App. 98-100). The jurisdictional statement in No. 84-902 was filed on December 5, 1984, and the jurisdictional statements in Nos. 84-922 and 84-1041 were filed on December 11, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(2). Review lies by way of appeal where, as here, a state court has held a state tax statute applicable to a particular set of facts as against the contention that such application is invalid on federal grounds. *Japan Line, Ltd.* v. *County of Los Angeles,* 441 U.S. 434, 441 (1979).

STATEMENT

1. Appellants in these three cases are 19 airlines established under the laws of foreign countries and having their principal places of business outside the United States. The nations in which they are domiciled are located in North America (Canada and Mexico), Central America (Costa Rica, El Salvador and Honduras), South America (Argentina, Brazil, Colombia, Ecuador, Guyana and Peru), and the Caribbean (Barbados, Jamaica, and Trinidad & Tobago). Each appellant has been found by the Civil Aeronautics Board to be owned and effectively controlled by the government or nationals of its home country. About half the appellant airlines

are wholly owned[1] or substantially owned[2] by the governments of the nations in which they are domiciled.

Each appellant has been designated by its home country to provide international air transportation to and from the United States. Aviation relations between the United States and appellants' home countries are governed inter alia by a multilateral aviation agreement commonly known as the Chicago Convention (Convention on International Civil Aviation, *opened for signature* Dec. 7, 1944, 61 Stat. 1180 *et seq.*). In addition, all of the appellants' home countries, except Honduras, have entered into bilateral executive agreements with the United States respecting air transportation services.[3] Pursuant to these agreements (or, in the case of Honduras, pursuant to CAB authorization (84-922 J.S. App. 43a)), appellants fly only on routes between their home countries and specified cities, called "gateways," in the United States (*ibid.*). Appellants engage in no intrastate or interstate flights within this country, and

---

[1] Aerolineas Argentinas, for example, is 100% owned by the Government of Argentina, Aeromexico by the Government of Mexico, Ecuatoriana by the Government of Ecuador, BWIA International by the Government of Trinidad & Tobago, and Varig by the Government of Brazil (84-922 J.S. App. 76a-79a).

[2] Mexicana, for example, is substantially owned by the Government of Mexico, Air Jamaica by the Government of Jamaica, Caribbean Air Cargo by the Government of Barbados, and Guyana Airways by the Government of Guyana (84-922 J.S. App. 77a; 84-1041 J.S. 17).

[3] After the Florida trial court entered judgment in these cases, the bilateral aviation agreements with three of appellants' home countries—Argentina, Brazil, and Peru—terminated. Negotiations toward new agreements have commenced, and it is not expected that the tax provisions of the new agreements, if any, will differ appreciably from those of their predecessors. For the sake of simplicity, we will in this brief generally refer to the relevant provisions of the bilateral agreements as they existed when the trial court rendered its decisions.

their operations here are thus exclusively in foreign commerce. See 49 U.S.C. App. 1508(b).

Each appellant operates to and from Miami, Florida, which is the primary domestic gateway for flights between the United States and South America, Central America, and the Caribbean, as well as a major stop for flights between this country and Europe. Appellants regularly purchase significant quantities of aviation jet fuel at Miami International Airport. This fuel is not purchased for export, but is consumed by appellants' airplanes in international commerce en route from Miami. Appellants are exempt from federal taxes on this aviation fuel by virtue of explicit provisions in the bilateral aviation agreements between the United States and their home countries, or, absent such provisions, by virtue of reciprocal tax exemptions provided to American carriers by appellants' home country governments.

2. For many years, Florida has imposed a sales tax on fuel purchased by common carriers, including airlines, within that State. This levy is an excise tax, not a user fee (84-922 J.S. App. 52a). The tax is technically imposed on the fuel supplier, but the supplier is required to pass the tax on to the purchaser (Fla. Stat. Ann. § 212.62(2) (West Supp. 1985)). Thus, the carrier bears the economic incidence of the tax.

Prior to April 1, 1983, Florida's sales tax on fuel, as it applied to all carriers, was prorated on a mileage basis. That is, a carrier paid only that portion of the otherwise-payable tax that represented the ratio of its Florida mileage to its worldwide mileage for the previous fiscal year. Fla. Stat. Ann. § 212.08(4) (West 1971). The Florida Supreme Court stated some years ago that this proration formula was designed "to prevent the State from exceeding its powers to tax interstate and foreign commerce" by ensuring that "Florida would only tax that portion of commerce activity that occurred within

the State." *Tropical Shipping & Construction Co.* v. *Askew,* 364 So. 2d 433, 435 (1978). Because appellants, following normal airline routes, travel only briefly in Florida air space, they and other foreign airlines paid little or no Florida fuel tax prior to April 1, 1983 (84-922 J.S. 3).

Effective April 1, 1983, the Florida Legislature substantially amended its fuel tax regime. The amendment most pertinent here was that repealing the mileage proration formula for airlines, while leaving it in effect for railroads engaged in interstate commerce and for vessels engaged in interstate or foreign commerce. Fla. Stat. Ann. § 212.08(4)(a)(2) (West Supp. 1985). As a result, airlines, including foreign airlines like appellants, are now taxed on all aviation fuel they purchase in Florida, even though that fuel is used exclusively in foreign commerce (84-922 J.S. App. 53a).[4]

---

[4] Florida recently enacted, effective July 1, 1985, further amendments to its scheme of aviation fuel taxation. 1985 Fla. Laws 85-348, § 9. While exempting aviation fuel from sales tax, those amendments impose a new excise tax specifically on aviation fuel. *Id.* §§ 2, 3. The amount of the levy (5.7 cents per gallon) is virtually the same as under the version of the law here challenged (5% of a deemed price of $1.148 per gallon). Compare 1985 Fla. Laws 85-348, § 2, with Fla. Stat. Ann. § 212.62(3)(c) (West Supp. 1985). However, rather than applying (as did the sales tax) only to aviation fuel purchased in Florida (see Fla. Stat. Ann. § 212.08(4)(a)(2) (West Supp. 1985)), the new excise tax applies to "aviation fuel sold in this state, *or brought into this state for use*" (1985 Fla. Laws 85-348, § 2 (to be codified at Fla. Stat. § 206.9825) (emphasis added)). A refund of the new excise tax is to be allowed "not [to] exceed six-tenths of one percent of the wages paid by the carrier to employees located or based within this state" (1985 Fla. Laws 85-348, § 2 (to be codified at Fla. Stat. § 206.9855)). This refund provision, of course, will provide virtually no tax relief to foreign airlines like appellants, which typically have few if any employees based in Florida. Enactment of these amendments, which apply only prospectively (1985 Fla. Laws 85-348, § 9)), does not moot the instant appeals, which continue to present a live controversy concerning appellants' sales tax liability from April 1, 1983, to July 1, 1985.

3. Appellants brought these actions in the Leon County Circuit Court seeking declaratory and injunctive relief against the application of Florida's sales tax to them. Their principal contention was that the tax, as applied to aviation fuel used by foreign airlines in foreign commerce, is inconsistent with federal aviation policy, particularly as that policy is expressed in multinational and bilateral agreements executed by the United States and appellants' home countries. Appellants accordingly contended that Florida's tax, as applied, is unconstitutional under the Supremacy Clause and the Foreign Commerce Clause. See *Japan Line, Ltd.* v. *County of Los Angeles,* 441 U.S. 434 (1979).[5]

The circuit court did not explicitly declare Florida's aviation fuel tax unconstitutional. See 84-902 J.S. App. A23-A24; 84-922 J.S. App. 47a-48a; 84-1041 J.S. App. 35-36. However, the court found that the tax, as applied to appellants, was "inconsistent with the undertakings of the United States government in [its] international bilateral agreements," and it accordingly "recognize[d] an exemption from the fuel tax for [those] foreign

---

[5] A number of domestic airlines likewise brought suits challenging Florida's sales tax on aviation fuel, predicating their challenges chiefly on the Due Process Clause, the Equal Protection Clause, and the Interstate Commerce Clause. The Florida courts largely rejected those challenges, and appeals raising those questions are now pending in this Court. *Northeastern International Airways, Inc. & Arrow Air, Inc.* v. *Florida Department of Revenue,* No. 84-921; *Eastern Airlines Inc.* v. *Florida Department of Revenue,* No. 84-926; *Delta Airlines, Inc.* v. *Florida Department of Revenue,* No. 84-929. The Court has invited our views in those cases, and a brief expressing those views is being filed contemporaneously herewith. To the extent that the foreign airlines in the instant appeals replicate arguments made by the domestic airlines—arguments that the Florida courts rejected, relying on the decisions mentioned above (84-902 J.S. App. A2, A23; 84-922 J.S. App. 2a, 39a; 84-1041 J.S. App. 2, 28-29, 32)—we address those arguments in our other brief.

airlines whose governments have entered into executive agreements with the United States * * * or who have been granted Foreign Air Carrier Permits by the United States on a basis of reciprocity and comity" (84-922 J.S. App. 48a, 49a-50a; see 84-902 J.S. App. A23-A24; 84-1041 J.S. App. 36). On that basis, the court granted appellants "a permanent injunction against [the Florida] Department of Revenue from assessing and collecting fuel taxes pursuant to" the challenged statute (84-1041 J.S. App. 36; see 84-902 J.S. App. A22; 84-922 J.S. App. 48a).

The court recognized that this Nation's bilateral aviation agreements, negotiated at various times over a 40-year period, deal with fuel taxes under somewhat differing rubrics, and that none of those agreements explicitly interdicts state or local, as opposed to "national" (viz., federal), taxes on aviation fuel. See 84-902 J.S. App. A23; 84-922 J.S. App. 41a; 84-1041 J.S. App. 33-34. At the same time, however, the court recognized that those agreements evidence a well-settled federal policy favoring "reciprocal tax exemptions" (84-922 J.S. App. 44a), a policy "designed to establish federal uniformity and prevent retaliatory taxes on U.S. carriers," and, by "prevent[ing] any discrimination, * * * to further the free flow of international aviation" (84-902 J.S. App. A22, A23). The court noted that " 'the Federal Government must speak with one voice when regulating commercial relations with foreign governments' " (84-922 J.S. App. 47a, quoting *Japan Line,* 441 U.S. at 449), and that federal aviation authorities over the years have consistently endeavored to persuade foreign nations to eliminate aviation fuel taxes on the basis of reciprocity (84-922 J.S. App. 46a). "[A]llowing the fifty states to impose individual state taxes," the court concluded, "would thwart the purpose of these federal efforts and infringe on the federal power to regulate foreign commerce" (*ibid.*).

Upon cross-appeals from the circuit court's judgments, the intermediate appellate court certified the cases directly to the Florida Supreme Court (84-922 J.S. App. 37a), which, in a divided opinion, "reverse[d] the circuit court's order to the extent that it recognized an exemption from the excise tax for the foreign airlines" (*id.* at 2a; 84-902 J.S. App. A6; 84-1041 J.S. App. 30). The Florida Supreme Court initially rejected appellants' argument, based on the Supremacy Clause, that Florida's tax was preempted by the federal bilateral agreements. The court believed that those agreements "clearly express an intent to apply to only national taxes and duties," and the court "d[id] not believe that the scheme of [those] agreement[s] is so pervasive as to permit the reasonable inference that Congress intended to preclude the state's power to tax" (84-902 J.S. App. A5; see 94-922 J.S. App. 2a; 84-1041 J.S. App. 28-29).

The court then addressed appellants' argument that Florida's tax, as applied to them, violates the Foreign Commerce Clause as interpreted by this Court in *Japan Line, Ltd.* v. *County of Los Angeles,* 441 U.S. 434 (1979). This Court there held that a state tax on the instrumentalities of foreign commerce is invalid if it either "creates a substantial risk of international multiple taxation" or "prevents the Federal Government from speaking with one voice when regulating commercial relations with foreign Governments" (441 U.S. at 451 (original quotation marks omitted)). The Florida Supreme Court noted that "the first requirement of *Japan Line* was not a concern [here] because there had been no de facto showing of multiple taxation or substantial risk of the same" in the instant cases (84-902 J.S. App. A6). Disagreeing with the trial court, however, it also held that Florida's tax satisfies the second requirement of *Japan Line,* emphasizing that the

federal bilateral agreements explicitly address only national duties and charges and "do[ ] not provide for exemptions from state excise taxes." The court "presume[d] this has been done intentionally" and concluded that Florida's tax accordingly does not "prevent[ ] our federal government from speaking with one voice" (84-902 J.S. App. A6).

Justice Overton, joined by Justice McDonald, dissented. They contended that "the individual states of this country are precluded by [the federal bilateral] agreements from taxing fuel used by foreign airlines," noting that, under the majority's holding, "United States airlines could, in turn, be subject to local government taxation on fuel in foreign countries" (84-902 J.S. App. A7). The dissenting justices thus concluded that Florida's tax, as applied to appellants, violates the Supremacy Clause and the Foreign Commerce Clause.

DISCUSSION

This Court held in *Japan Line* that the Commerce Clause commits to the exclusive authority of the federal government the regulation of those aspects of foreign commerce which by their very nature require uniform national treatment. In our view, the imposition of levies and charges on airplane equipment and supplies, including aviation fuel, used by foreign airlines exclusively in international traffic is an aspect of foreign commerce that shares this nature. Florida's tax, as applied to appellants, is inconsistent with strongly-articulated federal policy in this area and with accepted international practice. The tax, as thus applied, should be invalidated.

A. The Federal Government Is Committed To A Policy Of Reciprocal Tax Exemptions For Fuel And Supplies Used By Foreign Airlines In Foreign Commerce, And This Policy Represents The Established Practice Of Nations In The Aviation Field

This Nation's aviation relations with foreign governments are implemented through a comprehensive network of treaties, bilateral executive agreements, informal arrangements, and federal statutory provisions. The pattern produced by these varied strands, a pattern to which the federal government has long been committed, is one of reciprocal tax exemptions for aircraft, equipment and supplies, including aviation fuel, that constitute the instrumentalities of international air traffic. Due in part to our Nation's advocacy, this pattern has become the accepted international norm in the aviation field, a consensus that reflects the longstanding custom of nations in international maritime trade.

1. The United States and 156 other nations, including all of appellants' home countries, are parties to the Chicago Convention on International Civil Aviation, *opened for signature* Dec. 7, 1944, 61 Stat. 1180 *et seq.* That Convention binds its signatories to implement various measures to facilitate air transportation (arts. 22-28, 61 Stat. 1186-1188). One of these measures, set forth in Article 24(a), provides that aircraft engaged in international traffic, as well as "[f]uel, lubricating oils, spare parts, regular equipment and aircraft stores on board [such] an aircraft," shall, upon arrival in a contracting state, "be exempt from customs duty, inspection fees or similar national *or local* duties and charges" (61 Stat. 1186 (emphasis added)).

Article 24(a) explicitly applies only to aviation fuel and supplies which are "on board an aircraft * * * on arrival * * * and retained on board on leaving" a given

country (61 Stat. 1186). Consistently with the purposes of the Chicago Convention, however, Article 24(a)'s policy of reciprocal exemptions has been accorded much broader scope. As a party to the Convention, the United States is a member of the International Civil Aviation Organization (ICAO), which was established by the Convention (arts. 43-66, 61 Stat. 1192-1200) to "[a]void discrimination among contracting States" and to "[p]romote generally the development of all aspects of international civil aeronautics" (art. 44, 61 Stat. 1193). During 1948-1951, the Air Transport Committee of ICAO, recognizing that the Convention "did not attempt to deal comprehensively with tax matters," undertook a "comprehensive study of the various existing and anticipated problems related to taxation in the field of international air transport." *ICAO's Policies on Taxation in the Field of International Air Transport,* ICAO Doc. 8632-C/968, at 1 (Nov. 1966) [hereinafter cited as *ICAO Policies*]. Upon completion of that study, the ICAO Council in 1951 adopted resolutions designed "to reduce to the fullest possible extent all forms of taxation on the sale or use" of the instrumentalities of air traffic (*id.* at 2).

During 1965-1966, ICAO exhaustively reviewed the responses of the Chicago Convention's contracting states to the 1951 resolutions. It found that "it is the common practice of many States with respect to ships and aircraft engaged in international navigation" not only "to exempt from taxation all fuel and lubricants on board on arrival" in a given territory, but also, "on a basis of reciprocity, to exempt from or refund taxes on fuel and lubricants taken on board at the final port of call in that territory." *ICAO Policies* 3. And ICAO found it desirable "to extend such exemptions or refunds to other consumable technical supplies, which, like fuel and lubricants, * * * are consumed during flight and are essential for that purpose" (*ibid.* (footnote omitted)).

Consistently with these findings, the ICAO Council adopted, on November 14, 1966, the following Resolution (*ICAO Policies* 3):

> [F]uel, lubricants and other consumable technical supplies taken on board [an aircraft] for consumption during [an international] flight shall be furnished exempt from all customs and other duties or, alternatively, any such duties levied shall be refunded * * *.

The Resolution defined "customs and other duties" to include "import, export, excise, sales, consumption and internal duties and taxes of all kinds levied upon the fuel, lubricants and other consumable technical supplies *by any taxing authority within a State*" (*id.* at 4 (emphasis added)).

The ICAO Council explained that this Resolution "endorsed the policy of reciprocal exemption" from taxes on aviation fuel used in international commerce, and that it reflected "longstanding maritime practice and the established policy of many States" (*ICAO Policies* 5). It noted that the policy of reciprocal tax exemptions had been "incorporated in the 1939 London Convention concerning Exemption from Taxation for Liquid Fuel and Lubricants Used in Air Traffic," a convention which had been "signed by representatives of 38 States" but which "never came into force as many of the signatories shortly thereafter found themselves at war" (*id.* at 1, 5). And the ICAO noted "the obvious practical difficulties inherent in adopting any other course," concluding that a policy of reciprocal tax exemptions by all taxing jurisdictions was "the only [course] available in the foreseeable future which would, in a simple and effective manner, assure equitable treatment for international aviation" (*id.* at 5).

Virtually all nations party to the Chicago Convention have substantially implemented the 1951 and 1966

ICAO Resolutions, and, accordingly, grant aviation fuel purchased by foreign airlines for use in international traffic a complete exemption from taxes, including sales, use, and excise taxes, regardless of whether such taxes are levied by the national government or by its political subdivisions.[6] The nations granting such across-the-board exemptions include most of our trading partners (such as Australia, China, Denmark, the Federal Republic of Germany, Greece, Japan, the Netherlands, Switzerland, and the United Kingdom), and most of the nations in which appellants are domiciled. The sole exception appears to be Canada, whose provinces impose taxes on aviation fuel and, like Florida, generally do not grant an exemption for fuel purchased by foreign airlines for use in foreign commerce. With that exception, however, the policy of reciprocal tax exemptions by all taxing authorities represents uniform international practice.

2. In the 38 years since the Chicago Convention came into force, the United States has signed bilateral aviation agreements with more than 70 foreign countries. Whereas the Convention itself is a treaty ratified by the Senate (see 61 Stat. 1180), these bilateral undertakings are typically executive agreements. They extend, with varying degrees of explicitness, a bilateral commitment parallel to that expressed multilaterally in Article 24(a) of the Chicago Convention and in ICAO's implementing Resolutions.

---

[6] A few nations (such as France) appear to limit their reciprocal exemption policy to commercial aircraft, as opposed to private airplanes. We are informed by the State Department that political subdivisions in India have legal authority to impose sales taxes on aviation fuel. However, in response to a directive from the central government, all Indian states to which United States airlines fly currently exempt fuel uplifted by international carriers from sales tax.

Almost all our bilateral agreements obligate the United States to "exempt the designated * * * airlines of the other Contracting Party to the fullest extent possible under [our] national law, on the basis of reciprocity, from import restrictions, customs duties, excise taxes, inspection fees, and other national duties and charges on fuel, lubricants" and other equipment and supplies used in international air service.[7] Several agreements accomplish the same result by binding the United States to accord airlines of the other contracting party, with respect to taxes on aviation fuel and supplies, "treatment not less favourable than that granted to * * * carriers of the most favoured nation."[8] Some of the earlier compacts, like Article 24(a) of the Chicago Convention, expressly refer only to aviation fuel and supplies "introduced into" the United States or "retained on board [the] aircraft * * * upon arriving in or leaving" this country.[9] The more modern agreements,

---

[7] Air Transport Services Agreement, Oct. 2, 1969, United States-Jamaica, art. 8(A), 20 U.S.T. 2966, *reprinted at* 84-1041 J.S. App. 101. See, *e.g.*, Nonscheduled Air Service Agreement, May 8, 1974, United States-Canada, art. XII(1), 25 U.S.T. 794, *reprinted at* 84-902 J.S. App. A58; Air Transport Services Agreement, Aug. 15, 1960, United States-Mexico, art. 7, 12 U.S.T. 65, *reprinted at* 84-922 J.S. App. 90a; Air Transport Services Agreement, Oct. 24, 1956, United States-Columbia, art. 7, 14 U.S.T. 432, *reprinted at* 84-922 J.S. App. 85a.

[8] Air Transport Services Agreement, Feb. 11, 1946, United States-United Kingdom, art. 3(2), 60 Stat. 1500, *reprinted at* 84-922 J.S. App. 92a (governing aviation relations with Guyana and Trinidad & Tobago). See, *e.g.*, Air Transport Services Agreement, Jan. 8, 1947, United States-Ecuador, art. 3(b), 61 Stat. 2775, *reprinted at* 84-922 J.S. App. 89a; Air Transport Services Agreement, Dec. 27, 1946, United States-Peru, art. 3(b), 61 Stat. 2587, *reprinted at* 84-1041 J.S. App. 113.

[9] Air Transport Services Agreement, Jan. 8, 1947, United States-Ecuador, art. 3(b) and (c), 61 Stat. 2775, *reprinted at* 84-922 J.S. App. 89a. See, *e.g.*, Air Transport Services Agreement, Dec. 27, 1946, United States-Peru, art. 3(b) and (c), 61 Stat. 2587, *reprinted at* 84-1041 J.S. App. 113.

however, follow the 1951 and 1966 ICAO Resolutions by extending the reciprocal exemption privilege explicitly to cover items "supplied in" this country,[10] that is, aviation fuel and supplies "taken on board aircraft of the carriers of [the other] Contracting Party in the territory of the [United States] and intended solely for use in international air services."[11]

In according reciprocal exemptions for aviation fuel taken on board foreign aircraft within this country, our bilateral agreements typically refer to "national duties and charges,"[12] charges "imposed by the national authorities,"[13] or "federal taxes."[14] Some agreements refer to duties or charges "imposed by the * * * Contracting Party,"[15] others to "national duties or charges

---

[10] Air Transport Services Agreement, Oct. 20, 1983, United States-Costa Rica, art. 9(2)(a) and (c), *reprinted at* 84-922 J.S. App. 87a-88a. See, *e.g.*, Air Transport Services Agreement, Apr. 8, 1982, United States-Barbados, art. 9(2)(a) and (c), T.I.A.S. No. 10370, *reprinted at* 84-1041 J.S. App. 110.

[11] Nonscheduled Air Service Agreement, May 8, 1974, United States-Canada, art. XII(1)(c), 25 U.S.T. 794, *reprinted at* 84-902 J.S. App. A58. See, *e.g.*, Air Transport Services Agreement, Oct. 24, 1956, United States-Colombia, art. 7(D), 14 U.S.T. 432, *reprinted at* 84-922 J.S. App. 85a.

[12] *E.g.*, Air Transport Services Agreement, May 8, 1974, United States-Canada, art. XII(1), 25 U.S.T. 794, *reprinted at* 84-902 J.S. App. A58; Air Transport Services Agreement, Aug. 15, 1960, United States-Mexico, art. 7, 12 U.S.T. 65, *reprinted at* 84-922 J.S. App. 90a-91a.

[13] *E.g.*, Air Transport Services Agreement, Oct. 20, 1983, United States-Costa Rica, art. 9(1), *reprinted at* 84-922 J.S. App. 87a.

[14] *E.g.*, Air Transport Services Agreement, June 23, 1982, United States-Brazil, art. IX, *reprinted at* 84-922 J.S. App. 83a.

[15] *E.g.*, Air Transport Services Agreement, Feb. 11, 1946, United States-United Kingdom, art. 3(2), 60 Stat. 1500, *reprinted at* 84-922 J.S. App. 92a.

[imposed] by the contracting party,"[16] and others simply to "exemption from taxes,"[17] without specifying what taxing jurisdictions are meant to be covered. Exemptions from federal charges are implemented through a host of statutory and regulatory provisions, which accord foreign-owned instrumentalities of air traffic treatment parallel to that accorded foreign-owned instrumentalities of maritime trade.[18]

Unlike our earlier agreements, our most recent bilateral aviation compacts—generally, those dating from 1978 onwards—explicitly address taxes imposed by political subdivisions as well as by the federal government. These agreements typically commit the United States to "use its best efforts to secure for the designated airlines of the other Party, on the basis of reciprocity, an exemption from taxes, duties, charges and fees imposed by State, regional and local authorities on [aviation fuel and supplies], except to the extent that the charges are based on the actual cost of providing the service."[19] Such "best efforts" clauses concerning state and local taxes are contained in agreements recently executed or negotiated with 18 foreign nations, including

---

[16] *E.g.*, Air Transport Services Agreement, Jan. 8, 1947, United States-Ecuador, art. 3(b), 61 Stat. 2775, *reprinted at* 84-922 J.S. App. 89a.

[17] *E.g.*, Air Transport Services Agreement, Sept. 22, 1977, United States-Argentina, art. F(3), 29 U.S.T. 2801, *reprinted at* 84-922 J.S. App. 82a.

[18] See, *e.g.*, 19 U.S.C. 1435 (entry of foreign vessels); 19 C.F.R. Pt. 4 (same); 49 U.S.C. App. 1509(c) (entry of foreign aircraft); 19 C.F.R. Pt. 6 (same); 26 U.S.C. 4221(a)(3), (d)(3) and (e)(1) (exemption from federal excise tax on the basis of reciprocity for fuel and supplies used in international air transport).

[19] *E.g.*, Air Transport Services Agreement, Apr. 8, 1982, United States-Barbados, art. 9(5), T.I.A.S. No. 10370, *reprinted at* 84-1041 J.S. App. 110.

the home countries of four of the appellants here (Barbados, Costa Rica, El Salvador and Jamaica)[20] and such important trading partners as China, the Federal Republic of Germany, Israel, and the United Kingdom.

3. As the above discussion reveals, none of our bilateral aviation agreements explicitly interdicts state or local taxes on aviation fuel used by foreign airlines in international traffic. To that extent, the bilateral agreements do not in terms reflect the full scope of our federal aviation policy, or the full scope of the international consensus evidenced by the 1951 and 1966 ICAO Resolutions, favoring reciprocal tax exemptions by *all* taxing jurisdictions. The reasons for this are largely of an economic and historical, partly of a legal, nature.

State taxation of international aviation has only recently become a matter of international concern. The period immediately following adoption of the Chicago Convention, when our bilateral agreements were first negotiated, coincided with the early days of commercial jet travel, a time when relatively few foreign airlines served the United States and when those that did serve it operated to a mere handful of international gateways here. Most foreign airlines purchased bonded fuel, which, under this Court's decisions (*McGoldrick* v. *Gulf Oil Corp.*, 309 U.S. 414 (1940)), was exempt from state taxes, and which, prior to the 1973 OPEC oil embargo, was both inexpensive and readily available. State taxing authorities thus had little reason to regard international aviation as a potential source of revenue. In those

---

[20] See note 19, *supra*; Air Transport Services Agreement, Oct. 20, 1983, United States-Costa Rica, art. 9(5), *reprinted at* 84-922 J.S. App. 88a; Air Transport Services Agreement, Apr. 2, 1982, United States-El Salvador, art. 9(5), T.I.A.S. No. 10488, *reprinted at* 84-1041 J.S. App. 115; Air Transport Services Agreement, Apr. 4, 1979, United States-Jamaica, art. 10(6), T.I.A.S. No. 9613, *reprinted at* 84-1041 J.S. App. 104.

relatively rare instances where state tax laws did (at least theoretically) reach aviation fuel used by foreign airlines, those taxes (like Florida's prior to April 1, 1983) were of the "burn-off" variety, *i.e.*, were prorated on a mileage basis. Since foreign airlines traveled only briefly in such states' air space, they would pay little if any fuel tax in actual practice. Finally, our early aviation agreements were negotiated at a time when the Executive Branch entertained some doubt about its constitutional authority to enter into such compacts, which are typically executive agreements rather than treaties, much less to use them as a vehicle for preempting state laws. The State Department's usual practice, in any event, was to exercise restraint on this score, particularly where (as was until recently true here) state taxes were of little practical concern to our trading partners. See 11 Foreign Affairs Manual § 721.3(b) (Feb. 25, 1985) (State Department guidelines on treaties and other international agreements, or "Circular 175") (citing potential conflict with state law as a factor to be considered in deciding whether to enter into a treaty or an executive agreement).

The field of international aviation has changed dramatically in recent years. The number of foreign airlines serving the United States, and the number of domestic gateways to which they fly, have increased geometrically. See M. Brenner, J. Leet & E. Schott, *Airline Deregulation* 119 (1985). The price of aviation fuel has risen about 700% since the OPEC oil embargo. *Id.* at 106. Bonded fuel, which was once readily available at all gateways, is now available at only one or two.[21] In

---

[21] Following the OPEC embargo, the price of bonded fuel, which must be manufactured exclusively from crude oil produced abroad, rose sharply as compared with the price of fuel manufactured from domestic supplies. Subsequently-enacted federal price and allocation regulations (see 15 U.S.C. (1976 ed.) 751 *et seq.*) further

short, the very factors that once made international aviation an unlikely source of state revenue now make it a rather tempting target.

It is thus no accident that our most recent bilateral agreements expressly commit the United States and its contracting partners to use their "best efforts" to ensure exemption from regional and local, as well as national, taxes on aircraft fuel and supplies. Although these provisions stop short of explicitly banning such levies, they are very strong expressions of federal policy on the subject. Indeed, many of our bilateral aviation agreements, in specifying the federal government's obligations generally, use similar executory language, requiring the United States (for example) to grant exemptions from national duties "to the fullest extent possible,"[22] to make "efforts * * * to provide * * * for exemption from taxes,"[23] to "make all possible efforts to ensure * * * exemption from federal taxes,"[24] and to "exercise [its] best efforts" to ensure the availability of various privileges.[25] The Chicago Convention, similarly,

---

limited the availability of bonded fuel. Because of its relatively high price and scarcity, foreign carriers, which in 1968 had derived 90% of their fuel from bonded stocks, derived only 4% of their supply therefrom by 1977. See U.S. Dep't of Energy, *Findings and Views Concerning the Exemption of Kerojet Fuels from the Mandatory Petroleum Allocation and Price Regulations* 38-40 (1978). Owing to this shrinkage in demand, the elaborate dedicated delivery and storage systems for bonded fuel, established to meet Customs Service regulations, were dismantled or combined with non-bonded fuel supply networks.

[22] *E.g.*, Nonscheduled Air Service Agreement, May 8, 1974, United States-Canada, art. XII(1), 25 U.S.T. 794, *reprinted at* 84-902 J.S. App. A58.

[23] *E.g.*, Air Transport Services Agreement, Sept. 22, 1977, United States-Argentina, art. F(3), 29 U.S.T. 2801, *reprinted at* 84-922 J.S. App. 82a.

[24] *E.g.*, Air Transport Services Agreement, June 23, 1982, United States-Brazil, art. IX(4), *reprinted at* 84-922 J.S. App. 83a.

[25] *E.g.*, Nonscheduled Air Service Agreement, May 8, 1974, United States-Canada, art. XI(3), XVI(3), 25 U.S.T. 794, 796, *reprinted at* 84-902 J.S. App. A58, A60.

obligates the United States to implement certain measures "to the greatest possible extent" (art. 12, 61 Stat. 1183) or "so far as it may find practicable" (arts. 23, 28, 61 Stat. 1186, 1188). The "best efforts" clauses concerning state and local taxes in our recent bilateral agreements have equal dignity with these provisions, and are properly regarded by foreign nations as expressing a strong federal commitment to the policy of reciprocal tax exemptions by *all* taxing jurisdictions.

4. Federal aviation authorities have made aggressive efforts over the years to implement the policy of reciprocal exemptions both internationally and domestically. Diplomatic steps have regularly been taken to encourage foreign nations to make and, once made, to honor, commitments to accord tax exemptions for aviation fuel used by United States carriers in foreign commerce.[26] In 1982, the State Department received communications from the United Kingdom expressing concern about the imposition of aviation fuel taxes by political subdivisions in this country. The Department thereupon wrote the tax authorities of various states, including Florida, noting that "foreign governments have questioned the appropriateness of imposing [such levies] on foreign air carriers in view of the generally-accepted and longstanding international practice of reciprocally exempting such items" (84-922 J.S. App. 95a). Some nations, the Department noted, "have raised the possibility that state and local authorities in their jurisdictions could impose similar taxes on U.S. airlines," a result that "would frustrate the inter-

---

[26] See, *e.g.*, U.S. Civil Aeronautics Board, *FY 1976 Report to Congress* 103-104 (1977) (discussing steps taken to protest actions by Argentina and Colombia respecting aviation fuel taxes); U.S. Civil Aeronautics Board, *FY 1977 Report to Congress* 108, 109, 112, 114 (1978) (same, actions by Chile, Colombia, Japan, and the Philippines).

national system of reciprocal tax exemptions and thereby significantly increase the cost of international air transportation" (*ibid.*). The Department emphasized that this was "an important matter affecting U.S. international relations" and urged state revenue authorities to exempt foreign air carriers, on the basis of reciprocity, "from taxes on aviation fuel and other items for which the federal government grants an exemption" (*id.* at 94a-95a).

Several months later, Florida announced its proposal to extend its aviation fuel tax, effective April 1, 1983, to fuel consumed by foreign airlines in foreign commerce. The State Department again wrote the Florida Department of Revenue, noting that it was "surprised and distressed" to learn of this proposal, and again urging the State to exempt foreign airlines "based on reciprocity" (84-922 J.S. App. 99a). The Department warned that Florida's failure to afford such an exemption "will cause serious foreign relations problems" (*ibid.*).

The foreign relations problems predicted by the State Department quickly materialized. To date, the United States has received diplomatic notes from 25 foreign countries (App., *infra*, 1a-58a) protesting Florida's tax on aviation fuel and similar taxes, enacted or proposed, by Illinois (*id.* at 25a, 36a, 58a) and New York (*id.* at 48a). The protesting governments include many of appellants' home countries, as well as Belgium, France, the Federal Republic of Germany, Iceland, Israel, Italy, Japan, the Netherlands, Norway (on behalf of itself, Denmark, and Sweden), Panama, Spain, Switzerland, the United Kingdom, and Yugoslavia.

The diplomatic notes uniformly point to the "international consensus" (App., *infra*, 10a, 23a, 42a, 44a, 53a) and the "established international practice" (*id.* at 2a, 5a, 8a, 12a, 35a, 40a, 49a) of according reciprocal tax exemptions for aviation fuel used in international traffic. They emphasize that this consensus, as evidenced by

the 1951 and 1966 ICAO resolutions, entails exemption from regional and local, as well as from national, levies (App., *infra*, 2a, 5a, 6a, 8a, 13a, 20a, 23a, 30a, 35a, 37a, 40a, 46a-47a, 48a, 53a). Several foreign governments point out that their political subdivisions do not impose taxes on fuel purchased by United States airlines (*id.* at 1a, 5a, 8a, 13a, 21a, 50a, 53a, 57a), advising that their restraint in this respect is "based on the assumption that the United States will provide reciprocal treatment to [their] carriers" (*id.* at 1a). Florida's tax, in their view, "undermines the basis of reciprocity that has previously existed" between their nations and ours (*id.* at 2a, 9a, 21a, 53a), inviting retaliatory measures by local jurisdictions elsewhere (*id.* at 5a, 9a, 23a, 41a, 48a). The diplomatic notes repeatedly stress the damage that a proliferation of such taxes would cause to international aviation (*id.* at 9a, 10a, 14a, 23a), and, in several instances, take the position that Florida's tax is inconsistent with the bilateral aviation compacts that the United States has executed with their governments (*id.* at 2a, 5a, 13a, 16a, 31a, 37a, 46a, 53a).

B. A State Tax Is Invalid Under The Commerce Clause If It Frustrates Attainment Of Federal Uniformity On An Aspect Of Foreign Commerce As To Which Federal Uniformity Is Essential, And Thus Prevents The Federal Government From Speaking With One Voice When Regulating Commercial Relations With Foreign Countries

1. In *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434 (1979), this Court outlined the constitutional analysis to be employed under the Commerce Clause where a state seeks to tax the instrumentalities of foreign commerce. Appellants there were six Japanese maritime companies whose cargo shipping containers were subjected to an ad valorem property tax in Cali-

fornia (441 U.S. at 436). The containers, like the ships on which they were carried, were owned by the Japanese companies, were domiciled and registered in Japan, and were used exclusively in international traffic (*id.* at 436-437).

This Court assumed arguendo that the property tax, as applied to the Japanese containers, would pass the nexus, apportionment, and nondiscrimination tests of *Complete Auto Transit, Inc.* v. *Brady,* 430 U.S. 274, 279 (1977), and hence would be valid under the Commerce Clause "if the containers at issue * * * were instrumentalities of purely interstate commerce" (441 U.S. at 445, 451). However, because the containers were "instrumentalities of foreign commerce," the Court held that it was necessary to answer two further questions in assessing the tax's validity: "first, whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation, and, second, whether the tax prevents the Federal Government from speaking with one voice when regulating commercial relations with foreign governments" (*id.* at 451 (original quotation marks omitted)). "If a state tax contravenes either of these precepts," the Court held, "it is unconstitutional under the Commerce Clause" (*ibid.*).

The Court concluded that California's tax, as applied, failed both of these tests (441 U.S. at 451, 453). It noted that the containers were taxed on their full value in Japan, so that California's levy necessarily caused international multiple taxation (*id.* at 436, 446-448, 451-452). And it held that California's tax would "frustrate attainment of federal uniformity" in an area—the imposition of charges on cargo containers used exclusively in international traffic—"where federal uniformity is essential" (*id.* at 448, 453).

The Court relied principally on two considerations in determining that the taxation of cargo containers was a

subject "necessitat[ing] a uniform national rule" (441 U.S. at 449). First, the Court noted that California's levy "create[d] an asymmetry in the international tax structure" (*id.* at 450). A state tax on foreign commerce, the Court said, "must be evaluated in the realistic framework of the custom of nations" (*id.* at 454). Under longstanding international practice, "[o]ceangoing vessels" and "[a]ircraft engaged in international traffic" were immune from taxation except by the nation of their registry or domicile (*id.* at 447 n.11). Cargo shipping containers were likewise regarded by the world community as "instruments of international traffic" (*id.* at 445-446 & n.10), and Japan accordingly taxed appellants' containers "consistently with the custom of nations" (*id.* at 447, 454) with the legitimate expectation that they would not be taxed elsewhere.[27]

A corollary of the "novel[ty]" of California's tax, when viewed against the established custom of nations, was the risk that other countries would retaliate against American carriers, a result that would plainly "place * * * impediments before this Nation's conduct of its foreign relations and its foreign trade" (441 U.S. at 450, 453). It was stipulated that "American-owned containers are not taxed in Japan," so that California's tax "create[d] an asymmetry in international maritime taxation operating to Japan's disadvantage." Under these circumstances, "[t]he risk of retaliation by Japan" was, in the Court's words, "acute." *Id.* at 453. Indeed, the Court noted that some nations provide a tax exemption for foreign-owned instrumentalities of commerce "only if the owner's country grants a reciprocal exemption"

---

[27] In our brief amicus curiae in *Japan Line* (77-1378 Br. at 14a), we noted the State Department's findings that "no foreign government, or political subdivision such as a province, state or municipality, imposes property taxes on foreign flag vessels, airlines, or containers, with the possible exception of Afghanistan."

(*id.* at 453 n.18). Hence, "[r]etaliation by some nations could be automatic" and "of necessity would be directed at American transportation equipment in general, not just that of the taxing State, so that the Nation as a whole would suffer" (*id.* at 450, 453 & n.18).

The second factor which the Court in *Japan Line* held to evidence "[t]he desirability of uniform treatment of containers used exclusively in foreign commerce" was the Customs Convention on Containers, May 18, 1956, 20 U.S.T. 301 *et seq.*, a multilateral compact ratified by the Senate to which both this country and Japan were party (441 U.S. at 452). Under that Convention, containers temporarily imported into this country are admitted free of customs duty and of "all duties and taxes whatsoever chargeable by reason of importation" (*id.* at 453 (citing 20 U.S.T. 304)). The Court did not hold that the Container Convention preempted California's tax under the Supremacy Clause; indeed, the Convention does not address state and local taxes, or any taxes other than those "chargeable by reason of importation." But the fact that Congress "ha[d] not pre-empted the field by affirmative regulation" was not in the Court's view dispositive of the Commerce Clause outcome, since that Clause, " 'without the aid of congressional legislation . . . affords some protection from state legislation inimical to the national commerce' " (*id.* at 454, quoting *Southern Pacific Co.* v. *Arizona,* 325 U.S. 761, 769 (1945)). The Container Convention, while not necessarily a source of preemption, was relevant to the Court's Commerce Clause inquiry because it "reflect[ed] a national policy to remove impediments to the use of containers as 'instruments of international traffic' " (441 U.S. at 453, quoting 19 U.S.C. 1322(a)), and hence showed that it would be inimical to the national commerce for California to tax foreign-owned containers as it sought to do.

2. In subsequent decisions, this Court has consistently reaffirmed the principles of *Japan Line,* both its general analytical approach and its particular sensitivity to state actions that may adversely affect this Nation's foreign commerce. See *South-Central Timber Development, Inc.* v. *Wunnicke,* No. 82-1608 (May 22, 1984), slip op. 18; *Container Corporation* v. *Franchise Tax Board,* 463 U.S. 159, 171, 184-197 (1983); *Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont,* 445 U.S. 425, 446-449 (1980). With equal consistency, however, the Court has declined to expand the principles of *Japan Line* to invalidate state taxes imposed on the income of domestically-based multinational corporations. The Court has reached that result whether the income takes the form of foreign-source dividends (*Mobil Oil Corp.,* 445 U.S. at 446-448) or foreign-source operating earnings (*Container Corporation,* 463 U.S. at 169 n.7).

The Court in *Container Corporation* noted "a number of important [similarities]" (463 U.S. at 187) between that case and *Japan Line.* The multinational taxpayer in each case had demonstrated some degree of "actual double taxation" (463 U.S. at 184, 187 & n.22). And California in each case had adopted a taxing policy (in *Container Corporation,* the "unitary method" of apportioning transnational income) that reflected "a serious divergence" from the policy adopted by the federal government (in *Container Corporation,* the "arm's-length method" of allocating intercorporate income), a federal policy which in turn was "consistent with accepted international practice" (463 U.S. at 187). But the Court also noted that there were "a number of ways in which [*Container Corporation* was] clearly distinguishable from *Japan Line*" (463 U.S. at 187), and these distinctions were held to carry the day.

First, the Court noted (463 U.S. at 187-188), as it had in *Mobil Oil Corp.* (445 U.S. at 448), that there are sub-

stantial differences between taxes on the income of a domestic taxpayer and "ad valorem property taxes assessed directly upon instrumentalities of foreign commerce." Taxes on foreign ships and planes, obviously, burden commerce in a more immediate and concrete way than taxes on the international cash flows of a domestic company. The Court emphasized, moreover, the difficulty of trying to figure out where the income of a multinational unitary business is really "earned." *Container Corporation,* 463 U.S. at 164-169, 192. Accord, *e.g., Exxon Corp.* v. *Wisconsin Dep't of Revenue,* 447 U.S. 207, 222 (1980); *Mobil Oil Corp.,* 445 U.S. at 438-439. Such difficulties, of course, do not attend efforts to ascertain the registry of an airplane or the home port of a ship.

A corollary of this difference between taxes on instrumentalities and taxes on income was a marked difference in "the alternatives reasonably available to the taxing State" (463 U.S. at 189, 192). In *Japan Line,* the state could avoid any burden on foreign commerce "simply by adhering to one bright-line rule: do not tax, to any extent whatsoever, cargo containers 'that are owned, based, and registered abroad and that are used exclusively in international commerce' " (463 U.S. at 189-190 (quoting 441 U.S. at 444)). To require that the State in *Japan Line* adhere to this rule "was by no means unfair, because the rule did no more than reflect consistent international practice and express federal policy" (463 U.S. at 190). In *Container Corporation,* by contrast, the state could not reasonably be expected utterly to refrain from taxing the domestic company's income, some of which was plainly earned within the state; and the question thus boiled down to a choice between competing allocation methods, each of which was concededly imperfect (463 U.S. at 182-184), and each of which could end up burdening foreign commerce depending on the particular facts involved (*id.* at 188 &

n.25, 190-193). In short, the Court did not believe that there existed in *Container Corporation,* as there existed in *Japan Line,* any method, at once obvious and fair, by which the state could ensure that foreign commerce would be perfectly protected.

Secondly, the Court in *Container Corporation* emphasized that the tax there "f[ell], not on the foreign owners of an instrumentality of foreign commerce, but on a corporation domiciled and headquartered in the United States" (463 U.S. at 188). "The most obvious foreign policy implication of a state tax," the Court noted, "is the threat it might pose of offending our foreign trading partners and leading them to retaliate against the Nation as a whole" (*id.* at 194 (citing *Japan Line,* 441 U.S. at 450)). Given the American residency of the taxpayer in *Container Corporation,* the risk of retaliation in that case, relatively speaking, was slight, for foreign governments generally have little interest "in reducing the tax burden of domestic corporations" (463 U.S. at 195). The Court observed that it had "specifically left open in *Japan Line* the application of that case to 'domestically owned instrumentalities engaged in foreign commerce' " (463 U.S. at 188-189 (quoting 441 U.S. at 444 n.7)), and, contrariwise, it specifically left open in *Container Corporation* the application of that case to the income of foreign or foreign-owned corporations (463 U.S. at 189 n.26).[28]

Besides the taxpayer's American domicile, the Court in *Container Corporation* cited other factors suggesting that the foreign relations impact there, as compared with *Japan Line,* would likely be marginal. Whereas in *Japan Line* "a convention signed by the United States

---

[28] Since the instant appeals present challenges to a state excise tax on aviation fuel, the Court in these cases would likewise have no occasion to address the validity of state income taxes imposed on foreign or foreign-owned corporations.

and Japan made clear * * * that neither National Government could impose a tax on temporarily imported cargo containers whose home port was in the other nation" (463 U.S. at 185), no comparable multilateral treaty existed in the income tax field. Although the United States had signed bilateral income tax agreements with many foreign nations, none addressed "the taxing activities of subnational governmental units such as States" (463 U.S. at 196 (footnote omitted)). Whereas the tax in *Japan Line* had created an asymmetry in international maritime taxation that *automatically* operated to foreign countries' disadvantage (463 U.S. at 194-195 (citing *Japan Line,* 441 U.S. at 453)), the Court did not believe that the same was true in *Container Corporation,* since California's "unorthodox treatment" could on the Court's view help or hurt a given taxpayer depending on the particular facts involved (463 U.S. at 195). Finally, the Court "note[d] * * * that in [*Container Corporation*], unlike *Japan Line,* the Executive Branch ha[d] decided not to file an *amicus curiae* brief in opposition to the state tax" (463 U.S. at 195 (footnote omitted)). For all these reasons, the Court concluded that California's unitary method of taxing domestic companies' income, unlike California's tax on the instrumentalities of foreign commerce in *Japan Line,* neither "implicate[d] foreign policy issues which must be left to the Federal Government" nor "violate[d] a clear federal directive," and hence did not prevent this Nation from speaking with one voice in foreign affairs (463 U.S. at 194).

C. Florida's Tax On Aviation Fuel Used By Foreign Airlines Exclusively In Foreign Commerce Is Inconsistent With Express Federal Policy And Established International Practice And Hence Should Be Invalidated Under The Commerce Clause

These cases present a substantial federal question concerning the power of a state to levy an excise tax on the instrumentalities of foreign commerce. This question is not directly controlled by any of this Court's prior decisions. However, we think that the situation here comes very close indeed to that presented in *Japan Line,* and we believe that Florida's tax should be declared unconstitutional as applied.

1. We agree with the courts below (see 84-902 J.S. App. A6, A33) that the "multiple taxation" aspect of *Japan Line* is not a concern in the instant cases. Appellants have not proved—indeed, they have not argued—that Florida's sales tax on aviation fuel "produces multiple taxation in fact" (*Japan Line,* 441 U.S. at 452). Nor do we think that Florida's tax "creates a substantial risk of international multiple taxation" (*id.* at 451). As this Court has noted in sustaining analogous state taxes on aviation fuel used by domestic carriers on interstate flights, the "taxable event" is the carrier's purchase of the fuel or its "withdrawal [of the fuel] from storage." *United Air Lines, Inc.* v. *Mahin,* 410 U.S. 623, 627 (1973). Accord, *Edelman* v. *Boeing Air Transport, Inc.,* 289 U.S. 249, 251-252 (1933); *Eastern Air Transport, Inc.* v. *South Carolina Tax Comm'n,* 285 U.S. 147, 152-153 (1932).[29] These taxable events, ob-

[29] These cases clearly do not control the outcome here. In each case, the airline was a domestic rather than a foreign corporation, and it appears that solely interstate, rather than international, flights were involved. See *United Air Lines, Inc.,* 410 U.S. at 624, 625, 629; *Edelman,* 289 U.S. at 250-251; *Eastern Air Transport,*

viously, take place entirely within the taxing state, and no foreign government, consistently with the custom of nations, could undertake to impose a levy upon them. In fact, far from being able to tax the event of sale, foreign nations could not purport to tax even the fuel itself, which typically will be consumed in international air space en route from the United States.

2. We agree with appellants, however, that Florida's tax is invalid under the "federal uniformity" aspect of *Japan Line,* which, as the Court there emphasized (441 U.S. at 451), is a separate and independent basis for invalidating a state tax under the Foreign Commerce Clause. In our view, the salient features of these cases put them virtually on a par with *Japan Line* and distinguish them in equal measure from *Container Corporation.* Those features, which we have already discussed in one way or another, may be briefly recapitulated:

First, the airlines here, like the shipping companies in *Japan Line,* are foreign rather than domestic corporations. Indeed, besides being domiciled abroad, many of the airlines are wholly or substantially owned by their national governments. See page 3, *supra.*

Second, the state tax here is imposed, as in *Japan Line,* not on income, but directly on the instrumentalities of foreign commerce. In *Japan Line,* the Court noted that the cargo containers sought to be taxed were associated with the ships that carried them both in our bilateral and in our multilateral agreements (441 U.S. at 436 n.1, 446 n.10, 452-453). Here, similarly, aviation fuel taken on board for use in international traffic is associated with the aircraft that carries it both in the

---

Inc., 285 U.S. at 150-151. In any event, the cases were decided long before this Court in *Japan Line* set forth the constitutional analysis to be employed when a state seeks to tax the instrumentalities of foreign commerce.

Chicago Convention and the ICAO Resolutions (see pages 10-13, *supra*) and in our bilateral aviation compacts (see pages 13-17, *supra*). These agreements evidence an international understanding that aviation fuel, no less than the shipping containers at issue in *Japan Line,* is an "instrument[ ] of international traffic" (441 U.S. at 446 n.10, 453).

Third, the state tax here, like the tax in *Japan Line,* "creates an asymmetry in the international tax structure" (441 U.S. at 450) which, unlike the tax in *Container Corporation,* operates *automatically* to foreign nations' disadvantage (see 463 U.S. at 194-195). The uniform practice of nations, evidenced by the Chicago Convention, the ICAO Resolutions, and other countries' implementation of those Resolutions, calls for the instrumentalities of international air traffic to be exempt from all taxes and duties (other than user fees) imposed *either* by national governments *or* by their political subdivisions. Indeed, this policy of reciprocal tax exemptions for the instrumentalities of airborne and maritime trade is the very same "custom of nations" upon which the Court in *Japan Line* relied (441 U.S. at 447 & n.11, 453 & n.18) in invalidating the tax there involved.

Fourth, there exists here, as in *Japan Line,* an "express federal policy" (*Container Corporation,* 463 U.S. at 190), evidenced by multilateral agreements, bilateral agreements, the federal statutory scheme, and consistent regulatory practice, favoring reciprocal tax exemptions for aviation fuel and supplies used in foreign commerce. Our bilateral aviation compacts do not expressly preempt, any more than the Container Convention in *Japan Line* expressly preempted, state taxes on aviation fuel. However, those agreements do "reflect[ ] a national policy to remove impediments to the use of [aircraft] as instruments of international traffic." *Japan Line,* 441 U.S. at 453 (original quotation marks omitted).

Fifth, it is possible here, as it was possible in *Japan Line,* for the state to avoid any burden whatsoever on foreign commerce by adhering to "a single internationally accepted bright-line standard" (*Container Corporation,* 463 U.S. at 193), namely, "do not tax, to any extent whatsoever, [fuel and supplies used by aircraft] 'that are owned, based, and registered abroad and that are used exclusively in international commerce.' " *Id.* at 189-190 (quoting *Japan Line,* 441 U.S. at 444). Here, as in *Japan Line,* "[t]o require that the State adhere to this rule [is] by no means unfair, because the rule [does] no more than reflect consistent international practice and express federal policy" (*Container Corporation,* 463 U.S. at 190). The difficulties that might attend state efforts absolutely to avoid burdening foreign commerce where income taxes are concerned simply do not arise in these cases.

Finally, the tax involved here, like the tax involved in *Japan Line,* clearly "implicate[s] foreign affairs" (*Container Corporation,* 463 U.S. at 194). The State Department has received diplomatic notes from 25 foreign nations protesting Florida's tax in the strongest terms. These notes reflect concern, not only about the instant tax, but about the possibility that "other States [will] follow[ ] the taxing State's example" (*Japan Line,* 441 U.S. at 450-451). See App., *infra,* 3a, 6a, 21a, 42a, 52a. Foreign nations' concerns in this respect have proven justified, since Florida's example has already been followed by Illinois[30] and Massachusetts,[31] and a bill

[30] See Ill. Admin. Reg. § 130.2080(c) (1984) (repealing exemption from sales tax on purchases of aviation fuel previously granted to companies whose stock was "owned exclusively or in part by foreign governments"). A lawsuit challenging this action was recently filed in Illinois trial court by ten foreign airlines. *Air Canada, et al.* v. *Department of Revenue of the State of Illinois,* No. 85CH-6973 (Cook County Cir. Ct. July 12, 1985).

[31] See Mass. Act of July 1, 1985, ch. 145, §§ 7, 9 (enacting new 5¢-per-gallon excise tax on aviation fuel and affording no exemp-

that would accomplish the same result has been introduced in California.[32] The diplomatic notes stress that a proliferation of aviation fuel taxes would prevent this country from offering "true reciprocity" to our trading partners (App., *infra*, 23a), provoking the threat of foreign retaliation that would jeopardize the reciprocal exemption policy.[33]

3. For these reasons, we believe that the Court should note probable jurisdiction in the instant three appeals. The cases involve airlines from 14 different countries, whose bilateral agreements with the United States differ in subtle ways. Although the outcome in our view should generally be dictated by overriding federal policy and established international practice rather than by the idiosyncratic provisions of particular compacts, we think the Court would benefit from having all the relevant fact patterns before it. Particularly might this be true in the case of the Canadian airline, appellant in

---

tion for fuel purchased by foreign airlines for use in foreign commerce). The Massachusetts law provides that the new tax shall not be construed "to apply to foreign or interstate commerce, except insofar as the same may be permitted under the provisions of the constitution and laws of the United States." *Id.* § 7 (to be codified at Mass. Gen. Laws Ann. ch. 64J, § 10).

[32] Assembly Bill 2341, Cal. Leg., 1985-1986 Reg. Sess. § 5 (as amended May 24, 1985) (repealing fuel tax exemption previously granted to airlines holding common carrier certificates under the laws of the United States "or of any foreign government").

[33] Besides the possibility of imposing taxes, foreign governments have at their disposal numerous other techniques for discriminating against United States airlines. They can levy artificially-inflated "user fees"; impose obstacles to repatriation of foreign earnings; route airlines to less desirable airports; refuse to let carriers use baggage handlers of choice; give local airlines preference in carrying air cargo; restrict United States airlines' local advertising; or impose excessively complicated customs procedures or other delays and inconveniences. See U.S. Civil Aeronautics Board, *FY 1976 Report to Congress* 103-108 (1977).

No. 84-902, which, owing to Canada's failure to accord American carriers reciprocal exemptions from provincial taxes on aviation fuel (see page 13, *supra*), could conceivably be situated differently from the other appellants.

CONCLUSION

Probable jurisdiction should be noted in No. 84-902; in No. 84-922, limited to the first question presented therein; and in No. 84-1041, limited to the first two questions presented therein.[34] For the reasons stated in our companion brief in Nos. 84-921, 84-926 and 84-929, the other questions presented here are insubstantial.

Respectfully submitted.

CHARLES FRIED
Acting Solicitor General
ALBERT G. LAUBER, JR.
Assistant to the Solicitor General

ABRAHAM D. SOFAER
Legal Adviser
Department of State
JIM J. MARQUEZ
General Counsel
Department of Transportation

SEPTEMBER 1985

[34] The Court may wish to consolidate the cases for oral argument.

APPENDIX

EMBASSY
OF THE
ARGENTINE REPUBLIC

D.E. No. 910

The Embassy of the Argentine Republic presents its compliments to the Department of State and has the honor to refer to the lawsuit *Lineas Aereas Costarricenses, S.A. v. State of Florida*, which it understands is currently pending before the Supreme Court of the United States. The Embassy of the Argentine Republic wishes to request that the United States support the position taken by the Argentine carrier and many other South American airlines in that case by making a formal presentation before the Court.

It is the policy of Argentina to exempt United States airlines from taxes on aviation fuel purchased by them in Argentine territory. As a result, United States airlines pay no fuel taxes to any governmental authority at any level in Argentina. This policy is based on the assumption that the United States will provide reciprocal treatment to Argentine carriers. Recent events in the State of Florida have called that assumption into question.

The Embassy understands that the State of Florida has imposed a 5.7¢ per gallon tax on aviation fuel purchased in that jurisdiction. We also understand that this tax applies to all fuel purchased by international airlines whether or not it is consumed within United States territory. The Embassy of the Argentine Republic is concerned that this tax, if allowed to stand, will place the United States in conflict with provisions of a number of international

agreements and the established international practice of providing exemptions from fuel taxes. They may, in turn, undermine the basis of reciprocity that has previously existed between the United States and Argentina.

The Embassy of the Argentine Republic would call the attention of the Department of State to Article 24 of the Chicago Convention and, in particular, to resolutions adopted by the Council of the International Civil Aviation Organization on November 14, 1966. These documents make clear the established international practice that airlines should not be required to pay taxes on items such as fuel. They also make it clear that this policy extends not only to taxes imposed by the Central Government, but also those established by local jurisdictions.

The current Air Tansport Services Agreement between the United States and Argentina applies this principle in the United States-Argentina markets. Article F of that agreement requires both parties to provide for exemption from taxes. The Embassy of the Argentine Republic notes that this provision is not limited to taxes imposed at any particular level of government and is clearly intended to cover all taxes and similar governmental charges. On the basis of this provision, Argentina has provided tax exemptions to United States airlines. The Embassy of the Argentine Republic respectfully submits that consistent with this agreement, the Government of the United States should do the same. This would require exemption of Argentine carriers from the Florida tax.

The Embassy of the Argentine Republic also notes that there are strong policy reasons supporting the rule against taxation of airline fuel. Many airlines

presently face serious economic challenges and cannot afford the additional burden that fuel taxes would impose on them. These airlines would be compelled to pass this tax onto their passengers and shippers. This would adversely affect the development of international aviation. Additionally, the Embassy of the Argentine Republic would note that if the Florida tax is found acceptable under United States law, other jurisdictions in the United States are likely to impose similar taxes. Indeed, the Embassy of the Argentine Republic understands that the State of Illinois has already taken such action in reliance upon the recent decision of the Florida Supreme Court upholding this tax. The Embassy of the Aregntine Republic is concerned that the establishment of such taxes would not only increase the expenses that airlines and their customers must bear, but would also pose difficult administrative problems. The Embassy of the Argentine Republic believes this would be inconsistent with the many international agreements calling for the establishment of uniform practices affecting international aviation. In view of all of these factors, if the Florida tax is permitted to be imposed, the Embassy of the Argentine Republic believes that foreign countries would feel compelled to re-examine critically whether the United States is, in fact, providing a satisfactory degree of reciprocity regarding fuel taxes.

The Embassy of the Argentine Republic understands that the validity of this tax is now under review in the Supreme Court of the United States in the *Lineas Aereas Costarricenses, S.A.* lawsuit previously mentioned. The Embassy of the Argentine Republic respectfully requests the United States to support the position of the foreign airlines challenging

this tax through the submission of an *amicus curiae* brief to the United States Supreme Court and to bring to the attention of that Court the implications that this tax has for the established system of international aviation.

The Embassy of the Argentine Republic wishes to advise the Department of State that this note should not be considered confidential and that it may be released to the public.

The Embassy of the Argentine Republic avails itself of this opportunity to express renewed assurances of its highest consideration.

Washington, D.C., December 27, 1984

AMBASSADE DE BELGIQUE

The Belgian Embassy presents its compliments to the State Department and wishes to draw its kind attention to the subject of fuel taxes imposed by States of the United States on international aviation.

Belgium exempts at all levels of its government fuel used in international airline operations by United States carriers. This exemption is based on reciprocity.

Belgium emphasizes the established international consensus favoring reciprocal exemption from taxes on the basis of Article 24 of the Chicago Convention as well as the resolutions of the ICAO Council of November 14, 1966 (ICAO Document 8632-C/968).

It is well known that many airlines are facing at the present time serious economic challenges and can ill afford the extra financial burden these taxes impose. Under these circumstances, similar taxes could be imposed by other governments including the government of Belgium.

Finally, State fuel taxes are incompatible with Article 9 of the bilateral aviation agreement between the United States and Belgium which specifically commits the United States Federal Government to use its "best efforts" to obtain exemption of taxes at all levels including the state and local level.

The Embassy of Belgium welcomes the opportunity to renew to the Department of State the assurances of its highest consideration.

Washington D.C., November 30, 1984.

[EMBASSY OF THE FEDERATIVE REPUBLIC OF BRAZIL]

No. 9

The Embassy of the Federative Republic of Brazil presents its compliments to the Department of State and has the honor to refer to the imposition of fuel taxes on foreign airlines by the State of Florida.

Such legislation, effective April 1, 1983, imposes a 5.7 cents per gallon tax on all aviation fuel purchased in the State of Florida, regardless of whether it is to be consumed in Florida or outside the United States.

This matter is of the greatest concern to the Brazilian Government for the following reasons:

A) a state fuel tax on international airlines appears to be incompatible with the spirit of paragraph VII of the Memorandum of Consultation of June 14, 1984, regulating bilateral civil aviation relations. In it each party agreed to the commitment "to make all possible efforts to ensure that the airlines of each country can operate at the maximum efficiency with a fair and equal opportunity".

B) the imposition of such state fuel tax may be deemed to be contrary to Article 24 of the Convention on International Civil Aviation (Chicago Convention), which provides that fuel on board an aircraft of a Contracting State shall be exempt from customs duty, inspection fees or similar national or local duties and charges. Further resolutions by the ICAO Council also provide for exemption from customs and all duties from fuel taken by foreign airlines.

C) other states in this country appear to be encouraged by the Florida fuel tax and seem to be inclined to impose similar taxes of their own.

D) like many other airlines, Brazilian airlines serving the US-Brazil market are currently facing serious economic challenges for which the Florida fuel tax would represent an additional financial burden.

The Brazilian Embassy is informed that a number of foreign airlines, [including] the Brazilian carrier VARIG S.A., will soon appeal to the United States Supreme Court the decision of the Florida Supreme Court of June 14, 1984, which reversed a lower State Court judgment exempting foreign airlines [from] the aforementioned tax. The Brazilian Embassy would appreciate it if the United States Government would extend formal support to the position of the plaintiffs through an *amicus curiae* brief to the Supreme Court, or any other means deemed appropriate.

The Embassy of the Federative Republic of Brazil avails itself of this opportunity to renew to Department of State the assurances of its highest consideration.

Washington, D.C., January 8, 1985.

EMBAJADA DE COLOMBIA
WASHINGTON

No. 1679/E-375

The Embassy of Colombia presents its compliments to the Department of State and has the honor to refer to the legal action instituted by a group of South American airlines entitled *Lineas Aereas Costarricenses, S.A., et al. v. State of Florida Department of Revenue.* The Colombian airline AVIANCA is one of the plaintiffs in this suit, which is now before the Supreme Court of the United States. This lawsuit challenges the validity of a law of the State of Florida imposing a tax of nearly six cents per gallon upon fuel taken aboard by the foreign airlines at Florida airports for international use.

The Embassy of Colombia wishes to bring to the attention of the Department of State its conviction that it is totally inappropriate for local jurisdictions to impose taxes upon fuel intended for use by international airlines. For many years there has been an established practice among nations of exempting fuel purchased by international airlines from tax. This practice is demonstrated in Article 24 of the Convention on International Civil Aviation and resolutions on this subject adopted by the Council of the International Civil Aviation Organization on November 14, 1966. This policy has played an important role in the healthy growth of international aviation by preventing an inappropriate financial burden on airlines and their customers.

Consistent with this international practice, Colombia does not impose taxes at the national or local level upon fuel intended for international airline use. Therefore, all American airlines in Colombia are

fully exempt from fuel taxes at all levels of government. This exemption is based upon effective reciprocity from the United States, including taxing authorities in state and local governments. The Embassy of Colombia views the imposition by the State of Florida of a tax upon fuel intended for use by Colombian carriers as an infringement upon the reciprocity that had previously been established.

The Embassy of Colombia also wishes to point out that the example of Florida could set a precedent to be followed by other governments. If the United States allows its states to impose taxes upon fuel purchased by international airlines, the airlines of the United States could very soon see the initiation of local or national taxes by other nations. The development of such a pattern would surely be detrimental to the interests of all concerned and harmful to the development of aviation.

The Embassy of Colombia understands that the LACSA lawsuit is now pending before the Supreme Court of the United States and strongly urges the United States to formally support the position of the international airlines by submitting to the Supreme Court a brief as *amicus curiae*. The active involvement of the United States in the Supreme Court proceedings would be viewed by Colombia as an appropriate action by the United States in fulfillment of its commitment to provide reciprocal tax exemption in matters regarding international aviation.

The Embassy of Colombia informs the Department of State that the contents of this note are not classified and can be disclosed.

The Embassy of Colombia avails itself of this opportunity to renew to the Department of State the assurance of its highest consideration.

EMBAJADA DE COSTA RICA
WASHINGTON, D.C. 20008

No. 893

October 24, 1984

Dear Mr. Secretary:

I have the honor to address your Excellency with respect to the matter of the imposition of fuel taxes by the State of Florida on international aviation, as well as similar taxes imposed by other local jurisdictions in the United States.

As your Excellency may know, reciprocal tax exemption treatment has been the practice worldwide to aircraft serving international routes. There is an international consensus expressed in Article 24 of the Chicago Convention as well as in ICAO resolution Document 8632-C/968.

Furthermore, the unilateral imposition of fuel taxes on international aviation on the part of the State of Florida is contrary to and violates the spirit of bilateral aviation agreements which provide for exemptions on the basis of reciprocity from national duties and charges.

In addition, the imposition of such aviation fuel taxes, on the part of state tax authorities, is undesirable as a matter of policy. It is not only detrimental to the overall development of international aviation, but could result in a confusing administrative situation and the possibility of widespread aviation fuel taxes worldwide.

Excellency, as a group of international airlines are presenting this matter to the United States Supreme Court in the very near future, on behalf of my Government I would kindly request your good offices to

obtain the support of the Government of the United States before said Court in favor of the principle of the reciprocal fuel tax exemption treatment which is embodied in the letter and the spirit of international aviation relations.

Accept, Excellency, the assurances of my highest consideration.

/s/ Claudio A. Volio
CLAUDIO A. VOLIO
Ambassador

EMBAJADA DEL ECUADOR
WASHINGTON, D.C.

No. -4-2- 185/84

The Embassy of Ecuador presents its compliments to the Department of State and has the honor to request the Department's attention to the following matter.

The State of Florida has imposed a tax of 5.7 cents per gallon on all aviation fuel sold in the State. This tax, which became effective April 1, 1983, is applicable even if the fuel is consumed outside the state or even outside the United States. The tax is thus imposed on fuel purchased by Empresa Ecuatoriana de Aviación ("Ecuatoriana"), the flag carrier of Ecuador, and other Ecuadorean cargo airlines that operate in the State of Florida.

Numerous South American air carriers, including Ecuatoriana, have filed a lawsuit in the Florida state courts (*Líneas Aéreas Costarricenses, S.A. et al. v. State of Florida Department of Revenue*) to challenge this law as being in violation of the United States Constitution. In 1983 the trial court held that foreign air carriers must be exempted from the tax. This decision was reversed by the Florida Supreme Court in June 1984. The carriers have appealed the case to the United States Supreme Court.

The Embassy of Ecuador wishes to inform the Department of State of the grave concern of the Government of Ecuador concerning the imposition of this tax on international air carriers such as Ecuatoriana. It is inappropriate for local jurisdictions such as the State of Florida to impose taxes on fuel used by international air carriers. Under the established practice of nations such fuel purchases are exempt from

tax. Consistent with this practice Ecuador does not impose taxes at the national or local level on fuel used by international air carriers. The Florida tax is inconsistent with this international standard of reciprocity.

This established practice of nations is also demonstrated by Article 24 of the Convention on International Civil Aviation ("Chicago Convention") and resolutions adopted by the Council of the International Civil Aviation Organization on November 14, 1966 (ICAO Document 8632-C/968). The Council resolved that "when an aircraft registered in one State departs from an international airport of another State either for another customs territory of that latter State or for the territory of any other State, the fuel, lubricants and other consumable technical supplies taken on board for consumption during the flight shall be furnished exempt from all customs and other duties." The term "customs and duties" includes "import, export, excise, sales, consumption and internal duties of all kinds levied upon fuel, lubricants and other consumable technical supplies by any taxing authority within a State." (Sec. 1, paras. 1 and 4).

The Embassy of Ecuador further regards the Florida tax on fuel to be used by Ecuatoriana as being inconsistent with the Air Transport Services Agreement between the Governments of the United States and Ecuador (TIAS 1606), which provides for exemption of fuel from "customs, inspection fees or similar duties or charges." (Art. 3 (c)). Consistent with the Agreement, as indicated above, Ecuador does not impose taxes at the national or local level on fuel used by international air carriers.

The imposition of Florida's tax could set a precedent for similar action by other governments. If that were to happen international air carriers—including those of the United States—would be substantially burdened by taxes imposed by national or local [authorities] of other nations. This would be detrimental to the maintenance and development of international aviation.

The Embassy of Ecuador understands that participation by the United States Government in the litigation before the Supreme Court in support of the position of the international air carriers would be important in protecting their interests. It further understands that the United States has presented *amicus curiae* briefs in similar circumstances. Therefore, the Embassy of Ecuador urges that the Government of the United States file an *amicus curiae* brief with the Supreme Court supporting the position of the international air carriers.

The Embassy of Ecuador avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

Washington, D.C., December 14, 1984

[EMBASSY OF EL SALVADOR]

1. Following is an informal translation of the text of Diplomatic Note 14139 dated December 3, 1984 from the government of El Salvador. Original is being pouched to department

2. I have the honor of addressing your Excellency with regard to air transport relations between the government of the United States of America and the government of El Salvador.

In particular allow me to call to the attention of Your Excellency a tax ruling regarding a tax on aviation fuel, established by the State of Florida and entered into force the first of April 1983, applying to airlines which do not have their principal offices in Florida, as is the case of the Salvadoran Air Line, Taca International Airlines, S.A.

Allow me to make known to Your Excellency, so that you can bring to the attention of the competent authorities of your government, that said ruling is not in accord with Article 9(2)(C) of the Air Transportation Agreement between the government of El Salvador and the government of the United States of America by virtue of which, on a reciprocal basis, are exempted from taxes "fuel, lubricants and the consumable technical supplies introduced into or supplied in the territory of a party for use in an aircraft of a designated airline of the other party engaged in international air transportation, even when these supplies are to be used on a part of the journey performed over the territory of the party in which they are taken on board." In this case, the principle established in this article, based on reciprocity, is not be-

ing applied by Your Excellency's government, while the North American Airlines enjoy this exemption.

On the other hand, based on Articles 9(5) and 11 (1, 2) of the Referenced Agreement, each party shall try to secure for the designated airlines of the other party, on the basis of reciprocity, an exemption from taxes imposed by state, regional and local authorities, with the objective of allowing a fair and equal opportunity for said airlines, using all appropriate methods within its jurisdiction to eliminate all forms of discrimination which adversely affect the competitive position of the airlines of the other party.

As a consequence of the fact that the action taken by the State of Florida contravenes Article 9(2)(C) and based on Article 9(5) and Article 11 (1, 2) the government of El Salvador urges your illustrious government to take the necessary actions to avoid application to the airline designated by El Salvador of this measure imposed contrary to the principles established in the air transportation agreement.

I take this opportunity to renew to Your Excellency the assurances of my highest and most distinguished consideration.

AMBASSADE DE FRANCE
AUX ETATS-UNIS

Washington, D.C.

30 novembre 1984

L'Ambassade de France présente ses compliments au Département d'Etat et a l'honneur de lui faire savoir ce qui suit:

La taxation sur les carburants des aeronefs instaurée par l'Etat de Florida à la suite d'une décision, en date du 11 avril 1983, préoccupe vivement les Autorités francaises.

1. En effet, cette mesure, susceptible à l'évidence d'être prise et appliquée dans d'autres Etats en termes voisins ou comparables, nous paraît, pour l'essentiel, en opposition avec l'esprit de notre accord bilatéral de services aériens du 27 mars 1946, notamment avec son article 3-C.

De même est-elle en opposition avec l'article 24 (A) de la Convention de Chicago en date du 7 décembre 1944.

Les autorités francaises croient donc devoir relever que le maintien d'une telle mesure risquerait de porter atteinte, du point de vue des responsabilités internationales, à la notion même d'accords bilatéraux de services aériens qui pourraient ainsi être modifiés de manière unilatérale et contrairement aux engagements formels souscrits par le gouvernement des Etats-Unis.

Cette constatation avait dèjà été faite par la note adressée le 5 mars 1984 par l'Ambassade à propos de l'affaire—analogue dans son esprit—de la suppression, dans l'Etat d'Illinois, de l'exonération de la taxe sur les achats effectués dans les aéroports.

2. En outre, cette mesure est contraire à la résolution ad hoc du Conseil de l'Organisation de l'Aviation Civile Internationale du 14 novembre 1966 qui prévoit à la section 1, paragraphes 2 et 4, que:

"lorsqu'un aéronef immatriculé dans un Etat part d'un aéroport international d'un autre Etat, soit à destination d'un autre territoire douanier de celui-ci, soit à destination du territoire d'un autre Etat, le carburant, les lubrifiants et autres produits consommables embarqués pour être consummés en vol doivent être fournis en franchise de tous droits de douane et autres, ou que les droits percus doivent être remboursés, à condition qu'avant de quitter le territoire douanier considéré, l'aéronef ait rempli toutes les formalités douanières et autres formalités de congé prescrites sur ce territoire."

Or, cette résolution, fondée sur la notion de réciprocité, est admise par tous les pays. Sa remise en cause porterait atteinte au climat des échanges internationaux; et elle constituerait une entrave certaine au développement des transports aériens internationaux, leur infligeant des surcoûts d'exploitation qui devraient alors être inévitablement supportés par les passagers.

S'agissant de la France, sa pratique est conforme à la résolution de l'OACI précitée, puisque les aéronefs immatriculés aux Etats-Unis, qui partent d'un aéroport francais à destination de n'importe quel autre Etat, sont exonérés, à raison du carburant et de produits embarqués, de la taxe sur la valeur ajoutée (TVA) par l'article 262-11-6 du code général des impôts, ainsi que de la taxe intérieure sur les produits pétroliers (TIPP) par l'article 192, section VI, du code des douanes.

Dans ces conditions, l'Ambassade de France, d'ordre de son Gouvernement, tient à appeler l'attention des Autorités américaines sur l'importance attachée à une solution rapide et heureuse de ce contentieux. Pour leur part, les Autorités francaises sont convaincues de la nécessité, pour les Autorités américaines, d'appuyer auprès de la Cour Suprême des Etats-Unis, la procédure engagée par un groupe de compagnies aériennes pour obtenir l'annulation de la mesure prise par l'Etat de Floride. Elles leur seraient donc reconnaissantes d'engager toute action adéquate dans ce sens.

Les Autorités francaises n'ont pas d'objections à ce que le contenu de cette note soit rendu public.

L'Ambassade de France saisit cette occasion pour renouveler au Département d'Etat l'assurance de sa très haute considération.

EMBASSY OF THE
FEDERAL REPUBLIC OF GERMANY
WASHINGTON, D.C.

The Embassy of the Federal Republic of Germany presents its compliments to the Department of State and has the honor to refer to the following:

By law effective April 1983, the State of Florida imposed a tax of 5.7 cents per gallon on all aviation fuel sold in Florida, regardless where the fuel is consumed. A group of airlines challenged the legality of the tax in the courts. On June 1, 1983, the Second Circuit Court in and for Leon County, Florida, decided that foreign carriers serving Florida must be exempted from the tax. On appeal by the State of Florida, however, the Florida Supreme Court, on June 14, 1984, reversed the lower court's judgment and held that the imposition of the tax on foreign airlines is legal. The airlines have appealed this decision to the United States Supreme Court.

For the reasons set forth below, the Embassy of the Federal Republic of Germany would appreciate it if the Department of State would support the position of the airlines by an amicus curiae brief to the United States Supreme Court:

1. Article 24 of the Convention on International Civil Aviation provides that fuel on board an aircraft of a Contracting State shall be exempt from customs duty, inspection fees or similar national or local duties and charges. Furthermore, a resolution adopted by the ICAO council on November 14, 1966 (ICAO-Doc. 8362-C/968-1966) provides exemption from customs and all other duties for foreign aircraft taking on board fuel and other consumable supplies.

2. During the still pending negotiations on a new bilateral air transport agreement both delegations achieved consensus on a new article 9, which, in extension of Article 7 of the bilateral air transport agreement of 1955, would grant reciprocal exemptions from national taxes for all purchases of aviation fuel. Both Contracting Parties would use their best effort to secure exemption of the said taxes imposed by state, regional or local authorities.

3. In the Federal Republic of Germany, foreign airlines are exempt from taxes on the purchase of fuel. Should the tax imposed by the State of Florida be upheld, the reciprocity in relation to the exemption existing in the Federal Republic of Germany would be jeopardized.

4. The State of Illinois, apparently encouraged by the judgment of the Florida Supreme Court, already imposed a similar "Retailers' Occupation Tax". Should the judgment of the Florida Supreme Court be confirmed, numerous States of the Union might follow suit. This would disrupt a longstanding worldwide practice established to prevent discrimination and to facilitate the operation of international air services.

5. State taxes on international aviation would prevent the United States to speak with one voice in an important are of foreign trade. This would impede international trade and may be contradictory to the Import-Export Clause of the Constitution of the United States.

The Embassy of the Federal Republic of Germany avails itself of this opportunity to renew to the De-

partment of State the assurance of its highest consideration.

Washington, 29 November 1984

EMBAJADA DE LA REPUBLICA DE
HONDURAS
WASHINGTON, D.C. 20008

November 7, 1984

No. 118-84 EHW/DE

Excellency:

I have the honor to address Your Excellency with respect to the matter of the aviation fuel taxes that have been imposed on international airlines by the State of Florida.

As Your Excellency may know, the established international consensus favors reciprocal exemption from taxes, which is expressed in Article 24 of the Chicago Convention, as well as in ICAO resolution document 8632-C/968.

The Honduran Civil Aeronautic Code contemplates that foreign airlines may introduce, for their own use, duty free fuel and lubricants providing that the Honduran airlines are treated in a reciprocal manner abroad. Since the Republic of Honduras does not have a federal structure, a true reciprocity on the part of the United States would require exemption from taxes at both federal and state levels.

The imposition of fuel taxes by the State of Florida, as well as similar taxes imposed by other local jurisdictions in the United States, could produce retaliatory measures by other foreign governments. This action would be detrimental to the overall development of international aviation and at the same time create administrative, legal, and economic problems.

At the present time, many airlines are facing financial difficulties and these fuel taxes represent a

serious economic challenge for them, which could provide an extra burden on passengers and shippers who use their services.

Excellency, as it is understood that this case will soon be presented to the United States Supreme Court by a group of international airlines, on behalf of my Government I kindly request your cooperation in obtaining the support of the United States Government before the Supreme Court in favor of the principle of reciprocal fuel tax exemption treatment.

Accept, Excellency, the assurances of my highest consideration.

/s/ Juan Agurcia
JUAN AGURCIA
Ambassador

EMBASSY OF ICELAND
2022 CONNECTICUT AVENUE, N.W.
WASHINGTON, D.C. 20008

The Embassy of Iceland presents its compliments to the Department of State and has the honor to request assistance in the following matter.

On several occasions the Embassy of Iceland has had the opportunity to express to you Iceland's concern over the continuing failure of the Illinois Department of Revenue to grant to Icelandair (the designated flag carrier of Iceland, partially owned by the government of Iceland) an exemption from Illinois sales and use taxes. Illinois legislation exempts sales to governmental bodies, and the Department of Revenue Rule 40 had confirmed that exemption. Recently, the Illinois Department of Revenue proposed to eliminate such exemption with respect to those foreign air carriers enjoying its benefit, and Iceland again objected. The Illinois Department of Revenue has now in fact eliminated the Rule 40 exemption and is now assessing its sales and use tax against foreign air carriers, regardless of the level of governmental ownership. The City of Chicago continues to levy its local taxes as well. As we have expressed to you, this local taxation is contrary to the tax treaties between the United States of America and Iceland, and is not in the best interest of foreign commerce between our nations.

We have learned that a recent State of Florida Supreme Court decision upheld that state's fuel tax on international aviation. We understand that the carriers involved have appealed to the United States Supreme Court in the case entitled "*Lineas Aereas Costarricenses, S.A. (LACSA), et al. v. Department*

of Revenue, State of Florida". Although the Republic of Iceland is not directly involved as a litigant, we have noted with great interest that the Illinois Department of Revenue, in support of its successful proposal to eliminate the Rule 40 exemption, relied heavily on this Florida decision. In addition, because Icelandair recently has inaugurated a service into Orlando, Florida, Iceland considers it appropriate to express to you, and to request your assistance in presenting, The Republic of Iceland's support of appellant LACSA and its opposition to the imposition of local taxes on international air traffic.

The history of agreements and treaties between The Republic of Iceland and the United States of America relating to the commerce between our two nations has been characterized by mutual cooperation toward a common goal, a stable economic environment:

(a) The Air Transport Agreement of 1945, based on the International Civil Air Conference held in Chicago, Illinois of 1944, exempted aircraft fuel from import custom duties and use or consumption duties for flights into or over our respective nations.

(b) In 1962, an Agreement was entered into granting relief for double income taxation on the earnings from the operation of ships and aircraft operated under the laws of our respective nations.

(c) In 1975, a Convention was entered into for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital of our citizens and the businesses of our respective nations. Article 10 of the Convention specifically exempted from income taxation the "operation in international traffic of ship or aircraft" regis-

tered in our respective nations. In addition, pursuant to Article 17, Iceland agreed that its national capital tax, which has no counterpart in the United States Federal Tax Codes, would not be levied against ships, aircraft and other assets pertaining to the operation of such ships and aircraft.

(d) Lastly, on November 6, 1984, the United States Treasury Department certified the Iceland's exchange of information program for the new Foreign Sales Corporation provisions of The United States of America Tax Reform Act of 1984. We understand that these provisions may further strengthen the economic ties between our two nations.

The Republic of Iceland is concerned that its ability to function economically under its international tax and trade agreements with the United States of America has been, and may continue to be, threatened by the actions taken by local taxing authorities in the United States of America:

(1) Both The Republic of Iceland and the United States of America intended that the Agreements and Treaties would promote trade and commerce. However, as long as individual States and other local authorities assess taxes on the international commercial operations of Icelandair and other foreign carriers, such operations become more expensive. Indeed, if international air carriers such as Icelandair are forced to seek destinations in the United States of America based in any way upon considerations of local taxation of operational essentials such as aviation fuel, the States imposing such taxes, such as Florida and Illinois, may lose the sizeable financial benefits to local, state and regional commerce which naturally result from such international traffic.

(2) Local taxation of international commerce is inconsistent with and violates the reciprocity intended by our Agreements and Treaties. Local taxation prevents the Government of the United States of America from uniformly conducting its relationships with foreign governments. This lack of continuity undermines those relationships.

The Republic of Iceland hereby formally requests that The United States of America consider filing an *amicus curiae* brief in opposition to the State of Florida taxation of aviation fuel used in international aviation. We understand that such brief must be filed prior to January 10, 1985, which we understand is the current deadline.

The Embassy of Iceland avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

Washington, D.C.
December 18, 1984.

EMBASSY OF ISRAEL
WASHINGTON, D.C.

The Embassy of Israel presents its compliments to the Department of State and has the honor to request its assistance in the following matter.

In June 1984, the Supreme Court of the State of Florida held in a lawsuit involving Lineas Aereas Costarricenses and eleven other foreign carriers ("LACSA litigation") that the State's 5.7 cents per gallon sales tax on aviation fuel is valid. According to information given to the Embassy of Israel, the decision of the Florida Supreme Court is being appealed to the United States Supreme Court.

The Government of Israel wishes to express its strong concern with respect to the decision of the Florida Supreme Court. In addition, the Government of Israel wishes to express its interest in the outcome of the LACSA litigation in the United States Supreme Court.

El Al Israel Airlines Limited ("El Al") is the flag carrier of the State of Israel and is over 99% owned by the Government of Israel. El Al has been designated in accordance with the terms of the Air Transport Agreement between the U.S.A. and Israel, 13.6.1950, and the Protocol relating to the said Agreement of 16.8.1978, and foreign air carrier permits issued by the United States Civil Aeronautics Board, to conduct international flight operations between Miami and foreign points. El Al has in the past engaged and may in the future engage in operations into and from Miami. While the LACSA litigation directly concerns only aviation fuel taxes imposed by the State of Florida, it also has wider im-

plications for international airlines, such as El Al, that serve the United States.

It is the view of the Government of Israel that taxes such as the Florida aviation fuel tax on foreign carriers are in conflict with the principle that international air carriers should be exempt, [a] principle [that] has, for many years, been well established by international treaties and agreements to which the United States is a party.

The United States and the State of Israel are signatories to the Convention on International Civil Aviation (Chicago Convention). Article 24 of the Chicago Convention provides that fuel and aircraft stores on board an aircraft of a contracting state shall be exempt from customs duty, inspection fees or similar national or local duties and charges in the contracting states.

In addition, the International Civil Aviation Organization ("ICAO"), adopted on November 14, 1966, a Council Resolution, in furtherance of Article 24 of the Chicago Convention, which enunciates ICAO's policies on taxation in the field of international air transport and which provides, in part, that when an aircraft registered in one state departs from an international airport of another state, the fuel and other consumable technical supplies taken on board for consumption during the flight shall be exempt from all customs and other duties. The definition of "customs and other duties" set forth in that Council Resolution includes sales, consumption and internal duties and taxes of all kinds levied upon fuel by any taxing authority within a state. The United States has in general accepted the principles enumerated in the ICAO Council Resolution and does not itself impose any such charges. However, some states in the United States, for example, Florida, do

impose such charges. The Government of Israel considers taxes such as the Florida aviation fuel tax to be inconsistent with the aforementioned Resolution.

Moreover, paragraph (c) of Article IV of the Air Transport Agreement of June 13, 1950, between the United States and Israel provides that fuel and aircraft stores retained on board civil aircraft of the designated airline of one contracting party shall be exempt from customs, inspection fees or similar duties or charges in the territory of the other contracting party. This provision is not confined to national charges. It demonstrates the understanding as [between] our two countries of the need for reciprocal exemption from taxes on civil aviation, which would be seriously undermined by the imposition of local fuel taxes by any state of the United States.

Pursuant to paragraph (g) of Article 10 of the 1978 Protocol to the Air Transport Agreement, each party agrees to use its best efforts to secure for the designated airlines of the other party, on a reciprocal basis, an exemption from taxes, charges and fees imposed by state, regional and local authorities on, among other things, aircraft fuel and stores. The State of Israel has no taxes similar to taxes such as the Florida aviation fuel tax. Thus, American-owned airlines operating to and from Israel are granted full exemption from purchase-taxes similar to those imposed by the State of Florida.

The Government of Israel wishes to affirm its position that exemption from taxation on aviation fuel is granted on a basis of reciprocity and would consider the Florida sales tax a deviation from that principle.

It is, therefore appropriate for the State of Israel to request that the United States support the posi-

tion of the international airlines in the LACSA litigation and that the Department of State undertake to transmit the concerns of the State of Israel to the United States Supreme Court.

Dec. 5, 1984

AMBASCIATA D'ITALIA
WASHINGTON, D. C.

The Italian Embassy presents its compliments to the Department of State and wishes to draw its kind attention on the following matter.

Since April 1, 1983, the State of Florida has been applying a five percent sales tax on jet fuel purchased within the State, even by foreign carriers. It seems that the State of Illinois is also about to impose the same amount of tax on fuel purchases, even though foreign carriers have made juridical appeal against the Florida decision and are awaiting the decision of the Supreme Court of the U.S.

Article 3 of the current Civil Aviation Agreement, [like] those signed with many other European countries and Japan, guarantees on the basis of reciprocity the total exemption from import duties, charges and any other tax applied on fuels.

The Italian Embassy understands that the above agreement has not been ratified by the U.S. Senate and that, consequently, the single States maintain their right to autonomously apply such sales taxes in their territories. However, the Memorandum of Understanding, signed by the U.S. Government with various countries aimed at rectifying the conflict of interests between the Federal Government and the States of the Union, guarantee to the countries which signed the Memorandum the U.S. government's support and the application of the non-discriminatory clause (Most Favorite Nation).

In view of the above, and since Italy does not apply any sales taxes to U.S. aircraft re-fueling in Italy, the Italian Government would appreciate it if the Department of State would use its good offices in

order that the appropriate U.S. authorities will rectify the situation as soon as possible.

The Italian Embassy welcomes the opportunity to renew to the Department of State the expressions of its highest esteem and consideration.

Washington, D.C.
October 2, 1984

EMBASSY OF JAPAN
WASHINGTON

January 11, 1985

The Embassy of Japan presents its compliments to the Department of State and, with regard to the recent development in the state of Florida in imposing a tax of 5.7 cents per gallon on aviation fuel sold and loaded in the state for the purpose of international air transportation from April 1983, wishes under instruction from its home Government, to request the Government of the United States to take appropriate measures so that the fuel for use in international air transportation in the state of Florida will be exempted from tax in view of the following points:

(1) Article 6 of the Civil Air Transportation Agreement between Japan and the United States holds that both parties shall be exempted from sales tax on such goods as fuel and lubricating oils for the use in international air transportation purchased and loaded in the other party's territory on the basis of reciprocity;

(2) In the resolution of the International Civil Aviation Organization (ICAO), it is provided that such a fuel tax as that by the state of Florida should be eliminated on the basis of reciprocity. Therefore, the Government of Japan regards such taxation by the state of Florida as inconsistent with this Resolution;

(3) The Government of Japan believes that in encouraging development of an international exchange of people and commerce, it has become an internationally established practice to exempt [from] tax fuel used for the purpose of international air transport.

The Government of Japan wishes to point out that Florida's sales tax on such fuel impedes the sound development of international transportation.

Moreover, the Embassy wishes to call to the attention of the Department of State a similar appeal made on December 9, 1983, in response to the imposition of a similar kind of sales tax by the state of Illinois, and further to the action of Latin American airlines challenging the right of the state of Florida to impose such a tax through a lawsuit, which is currently under review by the United States Supreme Court.

The Embassy avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

[EMBASSY OF MEXICO]

[*Unofficial Translation*]

The Embassy of Mexico presents its compliments to the Department of State and would like to call its attention to the following matter.

The State of Florida established a tax of 5.7 cents per gallon on all aviation fuel sold in its territory from April 1st. 1983 onwards. For this reason, a group of airlines, including Mexicana and Aeroméxico, brought the case to a State court which ruled that foreign air-freighters operating in the State of Florida should be exempted from the aforementioned fuel-tax. However, the administrative State Government authorities of Florida appealed this decision to the State Supreme Court, which reversed the lower court ruling, endorsing the right to levy taxes on the fuel used by international airlines. Consequently, the airlines affected decided to appeal to the Supreme Court of the United States. The case is known as "Líneas Aéreas de Costa Rica, S.A. (LACSA) et al. vs. Department of Revenue, State of Florida."

This Embassy would like to express the serious concern of the Government of Mexico over this situation, since it is of the opinion that the decision made by the State of Florida is in disagreement with the contents of article 7 of the Agreement in force between the Governments of the United Mexican States and the United States of America on the subject of air-transportation. This measure is also inconsistent with the provisions of the Chicago Convention and the resolutions of the International Civil Aviation Council, specifically that of November 4, 1966 (ICAO document 8632-C/968). Moreover, this Embassy considers that if the legality of the fuel-tax levied by

the State of Florida were to be sanctioned, this would result in problems of multiple taxation.

Because of the aforementioned reasons, the Embassy of Mexico request, through the mediation of the Department of State, the support of the Government of the United States for the case of the airlines in question to be tried by the Supreme Court of Justice, suggesting for this purpose to use an *amicus curiae* procedure. It is the understanding of this Embassy that the deadline for the Department of Justice to act as *amicus curiae* would be January 10, 1985.

The Embassy of Mexico avails itself of this opportunity to convey to the Department of State the assurances of its kind consideration.

Washington, D.C. December 11, 1984.

[EMBASSY OF THE NETHERLANDS]

EA-14184

The Royal Netherlands Embassy presents its compliments to the Department of State and has the honour to request the Department's attention to the following.

The State of Florida imposed, effective April 1, 1983, a tax of 5.7 cents per gallon on all aviation fuel sold within its jurisdiction. Under this legislation, all fuel purchased in Florida is taxable, even if it is consumed outside of that state or, indeed, outside of the United States.

Lineas Aereas Costarricenses, S.A. and other foreign air carriers from the Caribbean and Central and South America filed a lawsuit in the Florida courts challenging the legality of this Florida state tax under the United States Constitution. On June 1, 1983, the court before which the initial hearings on this lawsuit were held issued a decision concluding that foreign carriers serving Florida must be exempted from this tax. The State of Florida appealed this decision to the Florida Supreme Court, which on June 14, 1984 reversed the lower court's determination and held that imposition of the tax on international airlines is proper. The plaintiffs have appealed the decision of the Florida Supreme Court to the United States Supreme Court.

The Royal Netherlands Embassy wishes to inform the Department of State of the grave concern of the Netherlands Government with regard to the aforementioned imposition of an aviation fuel tax by the State of Florida on international aviation. In this context, the Government of the Netherlands would

like to observe that said tax is inconsistent with the Air Transport Agreement between the Government of the United States of America and the Government of the Kingdom of the Netherlands of April 3, 1957, Article 7 (d) of which states that "fuel, lubricating oils, other consumable technical supplies, spare parts, regular equipment, and stores taken on board aircraft of the airlines of one Contracting Party in the territory of the other and used in international services shall be exempt on a basis of reciprocity from customs duties, excise taxes, inspection fees and other similar national duties, taxes and charges, even though such supplies be used or consumed by such aircraft on flights in that territory".

The Netherlands Government is of the opinion, furthermore, that the referred Florida state tax is contrary to the established international standard of reciprocity. More specifically, reference may be made to the Resolution of the Council of the International Civil Aviation Organization of November 14, 1966, in particular Section I, paras. 1 and 4 thereof, which stipulate that "when an aircraft registered in one State departs from an international airport of another State either for another customs territory of that latter State of for the territory of any other State, the fuel, lubricants and other consumable technical supplies taken on board for consumption during the flight shall be furnished exempt from all customs and other duties". "The expression 'customs and duties' shall include import, export, excise, sales, consumption and internal duties of all kinds levied upon fuel, lubricants and other consumable technical supplies by any taxing authority within a State".

The Netherlands Government has consistently manifested its opposition to any infringement of the

principle that international aviation should be exempted from taxes or other impositions. The Florida state tax under reference, if maintained, would not only be highly undesirable in itself from this point of view, but would, moreover, constitute a precedent for possible similar action by other foreign governments.

The Netherlands Government has been informed that the aforementioned plaintiffs will soon present their case to the United States Supreme Court. For the reasons set out above, the Netherlands Government urges the Government of the United States to give formal support to the position of the plaintiffs in this litigation by filing an *amicus curiae* brief to that effect with the United States Supreme Court. It is the understanding of the Netherlands Government that the deadline for submission of said brief in this case is presently set at January 10, 1985.

The Royal Netherlands Embassy, whilst thanking the Department of State for its attention to this important matter, avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

Washington, D.C.
December 3, 1984

ROYAL NORWEGIAN EMBASSY
WASHINGTON, D.C.

The Royal Norwegian Embassy, acting also on behalf of the Royal Danish Embassy and the Swedish Embassy, presents its compliments to the Department of State, and has the honour to draw the attention of the Department to the following matter:

The State of Florida on 1 April 1983 imposed a 5.7 per cent sales tax within the territory of its jurisdiction on jet fuel purchased by foreign airlines for international transport. The legality of this decision has since been challenged by a number of foreign airlines serving the US market, and the matter has been appealed to the United States Supreme Court with a request to review and reverse the decision of the State Government.

Already the action taken by the State of Florida has been referred to as a precedent by other local jurisdictions within the United States, contemplating similar measures with regard to taxation of foreign airlines.

The Governments of Denmark, Norway and Sweden have noted these developments with a growing concern. The three governments would in this context like to underline that American-owned airlines, as well as other foreign owned airlines, operating routes to and from Denmark, Norway and Sweden are in these countries granted full exemption from taxes and duties on similar purchases of fuel for international transport.

Such measures as taken by the State of Florida will not only be detrimental to the overall development of international aviation, but would also jeopardize the international consensus and standards of

reciprocity in this field, as well as the equilibrium of the taxation regime for civil aviation as now applied between our respective countries.

A further reason for the concern of the Scandinavian Governments is the possible effect such an action might have on other countries which might follow suit, with the ensuing apparent risk of seriously damaging the fundamental principles of avoidance of double taxation of air transport companies.

The Governments of Denmark, Norway and Sweden would therefore like to express their strong concern with regard to these measures, and urge the Government of the United States to use its good offices in order that the appropriate authorities will rectify the situation.

The Royal Norwegian Embassy avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

Washington, D.C., 11 December, 1984.

No. 106/84

EMBAJADA DE PANAMA
WASHINGTON, D.C. 20008

E.P.E.A.U. - 507 D

December 12, 1984

The Embassy of Panama presents its compliments to the Honorable Department of State and has the honor to refer to the aviation fuel taxes that have been imposed on international airlines by the State of Florida through its Senate Bill 8A, which was made effective on April 1, 1983.

The Government of Panama is deeply concerned with this matter, as the proposed taxes fall within Article III, Paragraph C of the Agreement on Air Transport Services Between the United States of America and the Republic of Panama, which was signed at Panama on March 31, 1949, which clearly indicates the following:

> "The fuel, lubricating oils, spare parts, regular equipment and aircraft stores retained on board civil aircraft of the airlines of one contracting party authorized to operate the routes and services described in the annex shall, upon arriving in or leaving the areas with respect to which the other contracting party has jurisdiction, be exempt from customs, inspection fees or similar duties or charges, even though such supplies be used or consumed by such aircrafts on flights in those areas."

On the other hand, the established international consensus favors reciprocal exemption from taxes, which is expressed in Article 24 of the Chicago Convention. Also, aviation fuel taxes such as those im-

posed by the State of Florida create a substantial risk of international multiple taxation, and particularly, retaliatory measures by other nations. At the present time many international airlines are facing severe financial difficulties, and the fuel taxes will represent a serious economic burden for them.

Being that many airlines have appealed this decision to the United States Supreme Court, the Embassy of Panama would appreciate very much if the Honorable Department of State would support the position of these airlines by an "Amicus Curiae" brief to the United States Supreme Court.

The Embassy of Panama avails itself of this opportunity to renew to the Honorable Department of State the assurances of its highest consideration.

SPANISH EMBASSY
WASHINGTON, D.C.

No. 301

The Embassy of Spain presents its compliments to the Department of State and has the honor to refer to the State of Florida Senate Bill 8A, about the introduction of a Tax concerning fuel purchased by airlines.

The Government of Spain considers that the proposed taxes fall within Article 7 of the Air Transport Agreement between the Government of the United States of America and the Government of Spain of August 3rd, 1973. In particular Article 7(d) states that "Fuel, lubricating oils, other consumable technical supplies, spare parts, regular equipment, and stores taken on board aircraft of the airlines of one contracting party in the territory of the other and used in international services shall be exempt on a basis of reciprocity from customs duties, excise taxes, inspection fees and other similar national duties, taxes or charges, even though such supplies be used or consumed by such aircraft on flights in that territory". This paragraph covers the taxes listed in the Notice of Proposed Amendment—which accordingly are not consistent with the Air Transport Agreement.

The Government of Spain may also refer to the Resolution of November 14, 1966 of the Council of the International Civil Aviation Organization. In particular Section 1, paragraphs 1 and 4 state that:

> "When an aircraft registered in one State departs from an international airport of another State either for another customs territory of that latter State or for the territory of any other

State, the fuel, lubricants and other consumable technical supplies taken on board for consumption during the flight shall be furnished exempt from all customs and other duties".

"The expression 'customs and other duties' shall include import, export, excise, sales, consumption and internal duties of all kinds levied upon the fuel, lubricants and other consumable technical supplies by any taxing authority within a State". Consequently, the proposals of the State of Florida are inconsistent with the aforementioned Resolution.

The Government of Spain therefore request that the Department of State urge the State of Florida to reconsider its proposals in the light of the United States obligations and commitments.

The Embassy of Spain avails itself of this opportunity to renew to the Department of State the expression of its highest consideration.

Washington, D.C., November 30th, 1984

[EMBASSY OF SWITZERLAND]

The Embassy of Switzerland presents its compliments to the Department of State and has the honor to refer to the recent amendment of the tax law of the State of New York about franchise taxes on transportation corporations.

This new legislation, amending the tax law, will impose on airlines serving the State of New York a tax on capital stock and gross earnings, thus removing the long-standing exemption from such tax granted to foreign airlines as Swissair. The Swiss authorities are concerned about such taxation of Swissair which would be a considerable departure from the worldwide accepted principle that enterprises should be taxed only by the State in which the management of the enterprise actually is located. It would also be contradictory to the ICAO policies on taxation in the field of international air transport stated in the Resolution on taxation of the income of international air transport enterprises and on taxation of aircraft adopted by the Council of ICAO on November 14, 1966 (ICAO Doc 8632-C/968 Section III). Clause No. 1 of this Resolution provides that Contracting States shall, to the fullest possible extent, grant reciprocally exemptions from taxation on the income, property taxes and capital levies or other similar taxes.

The introduction of the new tax would be likely to cause serious problems for the aviation industry and set off a chain reaction around the world which would but add to the present difficulties of the industry.

Finally, the Swiss authorities wish to draw the attention of U.S. authorities to the fact that the fran-

chise tax of the State of New York could have the effect that different Cantons (States) of Switzerland may take the necessary steps to introduce a similar tax to counter-balance the New York legislation.

In view of the foregoing, the Swiss authorities appreciate the consideration the Department of State will give to this matter. They ask the Department of State to kindly transmit the content of this note to the competent authorities of the State of New York. The Swiss authorities trust that the tax exemption for air carriers will be restored as was done for the shipping companies.

The Embassy of Switzerland avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

Washington, D.C.,
March 3, 1982

EMBASSY OF SWITZERLAND

The Embassy of Switzerland presents its compliments to the Department of State and has the honor to transmit the following:

The Swiss authorities have been informed of a lawsuit currently pending before the United States Supreme Court which involves the legality under the United States Constitution of a tax imposed by the State of Florida on aviation fuel purchased by foreign airlines. In this context the Embassy of Switzerland would like to refer to its note of December 19, 1983, and make the following statement: The Air Transport Agreement of August 3, 1945, between the United States and Switzerland includes in Article 3 tax exemption clauses for introduced and retained fuel. This regulation was consistent with the practice exercised shortly after World War II. Today it is generally recognized that tax exemption is also granted for uplifted fuel. Accordingly, this established practice was enrolled in the newer bilateral air agreements as concluded by the United States and also by Switzerland.

Furthermore, the Swiss authorities wish to point out that U.S. carriers operating to and from Switzerland have never had, up to now, to pay such taxes and duties. In order to prevent discriminatory practices and to assure equality of treatment of U.S. carriers in Switzerland and of Swiss airlines in the United States, the Swiss authorities consider it necessary that reciprocal tax exemption be granted to Swiss airlines.

The Swiss authorities are concerned about the possibility of creating a precedent by confirming the legality of the Florida Aviation Tax Decision by the United States Supreme Court.

For these reasons the Swiss authorities are opposed to such taxes and would be grateful if the Department of State would submit an amicus curiae brief to the United States Supreme Court in the sense of the foregoing statement.

The Embassy of Switzerland avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

Washington, D.C.,

November 30, 1984

EMBASSY OF THE REPUBLIC OF TRINIDAD AND TOBAGO

1708 MASSACHUSETTS AVENUE, N.W.
WASHINGTON, D.C. 20036

The Embassy of the Republic of Trinidad and Tobago presents its compliments to the Department of State of the United States of America and has the honor to refer to the Air Transport Services Agreement dated February 11, 1946 between the United States and the United Kingdom, an Agreement dated November 22, 1961 between the United States and the United Kingdom providing for air routes between the West Indies and the United States, and an Exchange of Notes dated September 27, 1962 and October 8, 1962 between the United States and Trinidad and Tobago to continue the application of certain agreements (referenced above) to scheduled services between the United States and the Caribbean area by United States and Trinidad and Tobago airlines. Particular attention is called to Article 3(2), (3) of the first document which concerns the reciprocal exemption of each party's air carriers from the payment of fuel and certain other taxes.

It has come to the attention of the Government of the Republic of Trinidad and Tobago that the State of Florida has enacted an aviation fuel tax which is applicable to fuel purchased by both domestic and international air carriers, including Trinidad and Tobago Airways Corporation ("BWIA"), the flag carrier of Trinidad and Tobago. It is also understood that similar taxes either have been enacted or are being considered for enactment by a number of other states.

The Government of the Republic of Trinidad and Tobago wishes to express its grave concern over the application of such taxes to fuel purchased in the United States by international air carriers such as BWIA. The Government of the Republic of Trinidad and Tobago exempts United States air carriers serving Trinidad and Tobago from aviation fuel taxes and other taxes imposed at all levels of government. This exemption is premised upon reciprocal tax exemption granted by the United States to the flag air carrier of Trinidad and Tobago. Moreover, the exemption is consistent with the well-established international consensus favoring reciprocal exemption from taxes which is expressed, for example, in Article 24 of the Chicago Convention and the resolutions of the ICAO Council on this subject, dated November 14, 1966. The Government of the Republic of Trinidad and Tobago believes that the taxation of international airlines by states within the United States is inconsistent with this international standard of reciprocity as well as the standard of reciprocity which exists between Trinidad and Tobago and the United States.

The Government of the Republic of Trinidad and Tobago believes further that the taxation of BWIA by states within the United States violates the spirit if not the letter of Article 3(2), (3) of the Air Transport Agreement dated February 11, 1946 between the United States and the United Kingdom which governs air transport relations between the United States and Trinidad and Tobago. In addition to the specific exemptions set forth in Article 3(2), (3), a more general policy of reciprocal exemption from taxes of all sorts has been established between the two governments. The tax enacted by the State

of Florida constitutes a serious threat to this established pattern of reciprocal exemption.

The Government of the Republic of Trinidad and Tobago believes that true reciprocity on the part of the United States requires air carrier tax exemptions at both the federal and local levels. The failure of the United States to ensure such complete exemptions may be considered a failure of reciprocity under applicable bilateral agreements, and could moreover constitute a precedent for similar action by other foreign governments.

The Government of the Republic of Trinidad and Tobago understands that the issue of state taxation of aviation fuel will shortly be presented to the United States Supreme Court by a group of international air carriers, including BWIA. The Government of the Republic of Trinidad and Tobago is advised that participation by the United States Government in this litigation in support of the position advanced by the international air carriers will be very important, perhaps essential, in the interest of the air carrier appellants. The Government of the Republic of Trinidad and Tobago understands further that it is not uncommon for the United States Governent to join, as *amicus curiae*, the effort of private litigants in similar situations. The Government of Trinidad and Tobago urges the Department of State of the United States to give formal support to the position of the international air carriers in this litigation through the filing of a brief *amicus curiae* with the court.

The Government of the Republic of Trinidad and Tobago has no objection to the public release of this Note.

The Embassy of the Republic of Trinidad and Tobago avails itself of this opportunity to renew to the Department of State of the United States of America the assurances of its highest consideration.

10th December, 1984

WASHINGTON, D.C.

EMBASSY OF THE UNITED KINGDOM

NOTE NO 190

Her Britannic Majesty's Embassy presents its compliments to the Department of State and has the honour to refer to the sales tax on aviation fuel for use in international air transportation which has been imposed by the state of Florida. This tax was challenged by a group of international airlines in the Leon County Circuit Court which decided, on 1 June 1983, that the tax was inconsistent with the obligations of the United States Government contained in its bilateral air transport agreements, and concluded that foreign carriers were entitled to an exemption from the tax. The decision of the Circuit Court was reversed by the Florida Supreme Court without that court having had an opportunity to consider a letter from the Deputy Assistant Secretary of State for Transportation and Telecommunications expressing concern about the serious foreign relations problems that the tax would cause unless provision was made to exempt foreign airlines from it. The plaintiff airlines are appealing the decision to the United States Supreme Court.

Article 8(5) of the United Kingdom/United States Air Services Agreement provides that each contracting party shall use its best efforts to secure for the designated airlines of the other contracting party on a reciprocal basis an exemption from taxes, charges

and fees imposed by state, regional and local authorities on, inter alia, fuel supplied in the territory of the first contracting party for use in the aircraft of those airlines engaged in international air services. The United States Government will also be aware that fuel purchased in the United Kingdom and used in international transportation by the designated airlines of the United States are not assessed by United Kingdom regional or local authorities for taxation purposes. In view of these considerations, and because the Florida Supreme Court did not have the opportunity to consider the policy of the federal authorities before it reversed the Circuit Court decision, Her Majesty's Government requests the United States Government to present their views to the United States Supreme Court in the form of an amicus curiae brief, the deadline for the filing of which is believed to be 10 January 1984.

The Embassy avails itself of this opportunity to renew the assurance of its highest consideration.

British Embassy
Washington DC

10 December 1984

[EMBASSY OF YUGOSLAVIA]

No. 109

The Federal Secretariat for Foreign Affairs of the Socialist Federal Republic of Yugoslavia presents its compliments to the Embassy of the United States of America and notes with interest and great concern the information received about the intention of the State of Illinois to remove sales tax exemption on fuel and food sold to foreign air carriers on its territory.

In the simplest terms, the Yugoslav authorities object in principle to a proposal stemming from a unilateral action, which could well be in conflict with ICAO Council Recommendation as well as with the letter and the spirit of Article 7, paragraph C of the existing bilateral Air Transport Agreement between our two countries, significantly affecting financial operations of the Yugoslav-designated air carrier which currently enjoys the aforesaid exemption.

Therefore, the Federal Secretariat for Foreign Affairs urges the Department of State to take necessary steps for the mentioned intention to be withdrawn, in conformity with the international comity, and avails itself of this opportunity to renew to the Embassy of the United States of America the assurances of its highest consideration.

Belgrade, January 20, 1984

EMBASSY OF THE UNITED
STATES OF AMERICA

BELGRADE

☆ U. S. GOVERNMENT PRINTING OFFICE: 1985 481531 10279

Supreme Court, U.S.
FILED
OCT 2
1985
JOSEPH F. SPANIOL, JR.
CLERK

(4) (5) 5

Nos. 84-902, 84-922 and 84-1041
In The
Supreme Court of the United States
October Term, 1985

Wardair Canada Inc., Appellant
v.
Florida Department of Revenue

Lineas Aereas Costarricenses, S.A.,
et al., Appellants
v.
Florida Department of Revenue

Air Jamaica Limited, et al., Appellants
v.
Florida Department of Revenue

On Appeal From
The Supreme Court of Florida

Appellee's Reply Brief to Amicus Curiae

JIM SMITH
Attorney General

WILLIAM TOWNSEND
General Counsel
STEPHEN KELLER
Asst. Gen. Counsel
Department of
Revenue
The Carlton
Building
Tallahassee, FL
(904) 488-0712

MITCHELL D. FRANKS
Chief Trial Counsel

JOSEPH C. MELLICHAMP,
III, Assistant
Attorney General
The Capitol
Tallahassee, FL
(904) 487-2142

BEST AVAILABLE COPY

TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS	i-ii
TABLE OF AUTHORITIES	iii
POINTS I AND II	1

POINT I. THIS APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION BECAUSE ALL ISSUES RAISED BY THE AMICUS HAVE BEEN FORECLOSED BY PRIOR DECISIONS OF THIS COURT.

POINT II. THE DECISIONS OF THE SUPREME COURT OF FLORIDA ARE CONSISTENT WITH PRIOR DECISIONS OF THIS COURT ON THE INVOLVED ISSUES OF LAW, MANY OF WHICH ARE CITED IN THE SUPREME COURT'S DECISIONS, AND IT IS MANIFEST THAT THE QUESTIONS ON WHICH THE DECISIONS IN THIS CAUSE DEPENDS, ARE SO INSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT.

A. THE FLORIDA SUPREME COURT'S DECISIONS ARE CONSISTENT WITH THIS COURT'S DECISION IN JAPAN LINE, LTD. V. COUNTY OF LOS ANGELES, 441 U.S. 434 (1979).

B. NONE OF THE AIR TRANSPORT INTERNATIONAL AGREEMENTS EXEMPT FOREIGN AIRLINES FROM IMPOSITION OF A STATE EXCISE TAX ON THE PURCHASES OF FUELS IN A STATE OF THE UNITED STATES.

	PAGE
DISCUSSION	1
CONCLUSION	11

TABLE OF AUTHORITIES

CASES:	PAGE
Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977), reh. den. 430 U.S. 976	3
Container Corp. of America v. Franchise Tax Board, 463 U.S. 159 (1983)	2
Guarantee Trust Co. v. United States, 304 U.S. 126 (1938)	2
Hines v. Davidowitz, 312 U.S. 52 (1941)	2
Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979)	1, 2, 3 4, 5
United States v. Pink, 315 U.S. 203 (1942)	2
MISCELLANEOUS:	
ICAO's Policies on Taxation in Field of International Air Transport, ICAO Doc. 8632-C/968 (Nov. 1966)	8

POINTS I AND II

POINT I. THIS APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION BECAUSE ALL ISSUES RAISED BY THE AMICUS HAVE BEEN FORECLOSED BY PRIOR DECISIONS OF THIS COURT.

POINT II. THE DECISIONS OF THE SUPREME COURT OF FLORIDA ARE CONSISTENT WITH PRIOR DECISIONS OF THIS COURT ON THE INVOLVED ISSUES OF LAW, MANY OF WHICH ARE CITED IN THE SUPREME COURT'S DECISIONS, AND IT IS MANIFEST THAT THE QUESTIONS ON WHICH THE DECISIONS IN THIS CAUSE DEPENDS, ARE SO INSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT.

A. THE FLORIDA SUPREME COURT'S DECISIONS ARE CONSISTENT WITH THIS COURT'S DECISION IN JAPAN LINE, LTD. V. COUNTY OF LOS ANGELES, 441 U.S. 434 (1979).

B. NONE OF THE AIR TRANSPORT INTERNATIONAL AGREEMENTS EXEMPT FOREIGN AIRLINES FROM IMPOSITION OF A STATE EXCISE TAX ON THE PURCHASES OF FUELS IN A STATE OF THE UNITED STATES.

DISCUSSION

These cases do not present a substantial federal question concerning the power of a state to levy an excise tax imposed upon the privilege of engaging in the business of selling tangible personal property which includes

aviation fuel (See 84-921, A.C. 7). The decisions of the Supreme Court of Florida are consistent with prior decisions of this Court in the Guarantee Trust Co. v. United States, 304 U.S. 126 (1938); United States v. Pink, 315 U.S. 203 (1942); Hines v. Davidowitz, 312 U.S. 52 (1941); Container Corp. of America v. Franchise Tax Board, 463 U.S. 159 (1983) and Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979).

The Amicus contends that the instant decisions of the Florida Supreme Court and thus Florida's excise tax, are inconsistent with federal policy as it relates to the taxation of aviation fuel purchased by foreign airlines, while in the United States, and this Court's decision in Japan Line. Based on those premises, Amicus argues that Florida's tax should be declared

unconstitutional as applied.

In Japan Line, this Court set forth two additional requirements to the "four prong" test referred to in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977), reh. den. 430 U.S. 976. The first was whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation, and second whether the tax prevents the federal government from "speaking with one voice when regulating commercial re-- lations with foreign governments." The decisions of the Florida Supreme Court are consistent with the Japan Line and meets both of the additional tests.

As stated by Amicus (See 84-902, A.C. 30), the "multiple taxation" aspect of Japan Line is not a concern in the instant cases. Appellants did not prove - indeed they have not argued - that Florida's sales tax on aviation fuel

"produces multiple taxation in fact" (Japan Line, 441 U.S. at 452). Additionally Amicus did not think that Florida's sales tax "creates a substantial risk of international multiple taxation" (id. at 451)(See 84-902, A.C. 30). The decisions of the Florida Supreme Court are consistent with these observations.

However, Amicus nevertheless suggests that Florida's excise tax, prevents the United States from speaking with one voice thus it fails to meet the second test in Japan Line, and thus is unconstitutional as applied.

First, it should be pointed out that Amicus' statement that fuel should be likened to the containers involved in Japan Line is incorrect. The containers in Japan Line were in fact instrumentalities used for shipping property into the United States.

The containers would be likened to the aircraft themselves and not to the fuel which is consumed by the aircraft in flying into the United States. Thus, Amicus' statement that the fuel is an instrumentality of commerce is totally incorrect. Furthermore, Amicus is incorrect in stating that Florida imposes a tax on aviation fuel. This is not true. Florida's tax is an excise tax imposed upon the privilege of engaging in the business of selling tangible personal property which includes fuel (See 84-921, A.C. 7). The excise tax is imposed on the vendor or dealer and is a privilege tax not a property tax as suggested by Amicus, and which was before this Court in Japan Line. Florida's excise tax on the privilege of engaging in business is totally dissimilar from the ad valorem property tax imposed on the

property itself, in that case, the containers.

Second, contrary to Amicus' contention, Florida's tax does not create an asymmetry in the international tax structure which operates automatically to foreign nations' disadvantage. Amicus leaves the impression that prior to 1983, Florida granted foreign airlines a proration of the tax which was not granted to domestic airlines in international commerce (See 84-902, A.C. 18). In fact, at that time both foreign and domestic airlines, operating over international routes, and traveling only briefly in Florida's airspace, were granted the proration on a mileage basis. With the abolishing of the proration of the tax on the aviation fuel purchased by either domestic or foreign airlines, both foreign and domestic airlines continue

to be treated equally by Florida. Today, as in the past, Florida provides equal, symmetrical treatment to foreign and domestic airlines in this taxation of sales of fuel purchased in Florida.

It is therefore incorrect to say that the Florida tax "operates automatically to foreign nations' disadvantage." This is a pure sales tax imposed upon the privilege of engaging in the business of selling tangible personal property which includes aviation fuel, irrespective of its use, whether in domestic or foreign commerce. The incident upon which the tax is imposed occurs prior to any commitment of the aviation fuel to any commerce, foreign or domestic. The tax is clearly neutral in its treatment of foreign airlines. It is therefore consistent with the federal policy of nondiscriminatory treatment of foreign

airlines.

Third, Florida's tax is not contrary to the expressed federal policy nor does it impermissibly implicate foreign affairs. In analyzing this tax and foreign affairs, an examination must be made of the "one voice" doctrine. Florida contends that its tax does not interfere with the authority of the United States to regulate commercial relations with foreign governments.

In the international compacts (See 84-902, A.C. 10-16), the federal policy expressed is a spirit of equality of opportunity and treatment. The ICAO's Resolution (See 84-902, A.C. 11), passed under the Chicago Convention on International Civil Aviation, implements the Convention's purpose: to avoid discrimnation against airlines among contracting states. The Conven-

tion, as Amicus states (See 84-902, A.C. 10) exempts only aviation fuel and supplies which are "on board an aircraft." The Resolution, by extending this practice to include state taxes on sales of fuel and supplies was in furtherance of assuring "equitable treatment for international aviation" (84-902, A.C. 12). The Florida tax is certainly consistent with equality of treatment and it is consistent with federal policy as expressed in the international compacts.

While Amicus states that the international compacts "differ in subtle ways" (84-902, A.C. 34), it can be stated without equivocation that the agreements do not expressly preempt state taxes, such as the Florida tax involved in the instant case. (84-902, A.C. 17 and 32).

Federal policy is enunciated by its expression in the official international compacts. This federal policy expresses a pattern, by these international compacts, which falls short of any prohibition upon state taxation of aviation fuel purchased by foreign airlines. Clearly, in this area, the federal government has spoken with one voice to accomplish equality of treatment.

The Amicus is requesting this Court to ignore these international compacts and the expressed federal policy by asking this Court to amend or rewrite these agreements to include an exemption from state excise taxes.

The federal government's "one voice" has spoken, and it says to treat all airlines equally, in every respect and to make sure there is no discrimination in favor of domestic

airlines against the foreign airlines. The Florida tax does not violate this federal policy. The outcome of this case should indeed be dictated by this federal policy and as enunciated in the particular compacts, which in their "idiosyncratic provisions" have set forth a federal policy which places no restrictions on the state's power to impose a nondiscriminatory tax, such as Florida's, upon the privilege of engaging in the business of selling tangible personal property which includes aviation fuel.

CONCLUSION

Based on the foregoing reasons, the Appellee urges the Court to grant its Motion to Dismiss the appeal or to affirm the decisions of the Supreme Court of Florida. These appeals do not present a substantial federal

question as the decisions of the Supreme Court of Florida are consistent with prior decisions of this Court, and it is manifest that the questions on which the decisions in these cases depends are so insubstantial as not to need further argument.

Respectfully submitted,

JIM SMITH
Attorney General

WILLIAM TOWNSEND
General Counsel
STEPHEN KELLER
Asst. Gen. Counsel
Department of Revenue
The Carlton Building
Tallahassee, FL
(904) 488-0712

MITCHELL D. FRANKS
Chief Trial Counsel
JOSEPH C. MELLICHAMP, III, Assistant Attorney General
The Capitol
Tallahassee, FL
(904) 487-2142